Copying Canada – A Critical Analysis Of The Barbados Bankruptcy And Insolvency Act

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Abstract

Barbados enacted the Bankruptcy and Insolvency Act in the year 2001. This Act is based entirely on the Canadian Bankruptcy and Insolvency Act. Barbados reformed its bankruptcy and insolvency laws in order to offer greater protection to debtors while simultaneously protecting creditors from fraud. Additionally, the new reforms were designed to remove the stigma that attaches to insolvent and bankrupt individuals and businesses and to make Barbados a more attractive destination for the creation of and investment in new businesses. Despite the existence of a legislative framework designed to assist debtors and creditors only five matters have been initiated under the Barbados Act. In this thesis I examine why there has been reluctance to rely on the Act. Ultimately, I conclude that the bankruptcy and insolvency regime that exists in Barbados is ineffective and lacks many of the features that are necessary for the efficient administration of bankruptcies and insolvencies.
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# Table of Contents

**Thesis Introduction**  
1  

**CHAPTER ONE**  
9  

The History of Bankruptcy and Insolvency Law and Practice in Barbados  
Canada and Jamaica.  
9  

1.1 Introduction  
9  

1.2 History of Bankruptcy and Insolvency Law and practice in Canada  
10  

1.3 History of Bankruptcy and Insolvency Law and practice in Barbados  
13  

1.4 History of Bankruptcy and Insolvency Law and practice in Jamaica  
18  

1.5 Concluding Remarks  
19  

**CHAPTER TWO**  
20  

The Underlying Policy Considerations that Influence Bankruptcy and  
Insolvency Law.  
20  

2.1 Introduction  
20  

2.2 The Rehabilitation of Debtors vs. The Equitable Treatment of  
Creditors  
21  

2.3 Encouraging the Creation of New Businesses and Encouraging  
Businesses to Take Risks  
23  

2.4 Removing the Stigma of Bankruptcy  
25  

2.5 Concluding Remarks  
27
CHAPTER THREE 28

Do the Bankruptcy and Insolvency laws of Barbados Fulfill the Policy Considerations underlying the Law? 28

3.1 Introduction 28

3.2 The Political Policy Considerations Within the Barbados BIA 28

3.3 The Economic Policy Considerations Within the Barbados BIA 35

3.4 The Social Policy Considerations Within the Barbados BIA 36

3.5 Concluding Remarks 37

CHAPTER FOUR 39

The system of Bankruptcy and Insolvency Law in Barbados is Not Working Efficiently. 39

4.1 Introduction 39

4.2 Deficiencies Within the Legislation 40

4.3 External Factors 46

4.4 Concluding Remarks 52

Conclusion and Recommendations 54

Bibliography 61
List of Appendices

APPENDIX A 64

Form 93, Application For Trustee License (Individual) 64
Thesis Introduction

Historically, the legislation concerning bankruptcy and insolvency law was harsh and rather punitive as against debtors. In recent years, however, bankruptcy regimes in many jurisdictions have evolved into systems that seek to assist and rehabilitate debtors, while also trying to protect creditors from fraud. Nevertheless, most English-speaking Caribbean countries retain punitive systems of bankruptcy law, based on the old English model of bankruptcy practice. Barbados, however, has recently departed from this model and adopted a new bankruptcy and insolvency regime based largely on the more modern Canadian principles of bankruptcy and insolvency practice.

In 2001, Barbados enacted the *Bankruptcy and Insolvency Act* (the Barbados BIA). The Barbados BIA was designed to establish simple and clear procedures to be followed in bankruptcy and insolvency actions commenced under the supervision of the high court. Senate debates regarding the passing of the Barbados BIA further revealed that a number of additional considerations led to the implementation of the new statute. The Barbados BIA was enacted primarily to correct the imbalance present in the *Bankruptcy Act, 1925* which was adopted from England, and deemed to be too “creditor friendly” at the expense of debtors. The Barbados BIA was also designed to offer debtors the opportunity to redeem themselves in business and to remove the stain or stigma that attaches to business failure. Another stated purpose of the Barbados BIA was to promote business in Barbados or make Barbados a more attractive destination for new businesses and to build national confidence in the business sector.

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5. *Ibid* at 3.
The Barbados BIA differs from the previous bankruptcy legislation in Barbados as it addresses both individual and corporate insolvencies. The Barbados BIA also instituted a number of fundamental changes that have completely altered the manner in which bankruptcy and insolvency law is administered in Barbados. While the extent of this reform will be assessed later, it is helpful to note some of the more important provisions that the Barbados BIA introduced into bankruptcy and insolvency practice in Barbados. The role of the trustee in bankruptcy was redefined with the trustee being granted similar powers to those that obtain in Canada. Likewise, the office of the Supervisor of Insolvency was created to improve the manner in which bankruptcies and insolvencies are managed. The Barbados BIA also provided for debtors’ proposals and implemented an automatic discharge from bankruptcy for first time bankrupts.

The implementation of these provisions has transformed the system of bankruptcy and insolvency law in Barbados into a regime that, at least in theory, offers greater protection and assistance to debtors. However, while reform has been significant in this regard, the effectiveness of the Barbados BIA may be limited in practice by a lack of regulatory supervision. No rules, regulations, or subsidiary legislation making provisions for the effective carrying out of the substantive legislation, have ever been enacted. Since the proclamation of the Barbados BIA, 5 matters have been commenced under the Act and none of these matters have been brought to completion.6

This thesis will seek to explore what factors, including the lack of regulations mentioned above, hinder the efficient resolution of bankruptcy and insolvency matters in Barbados. In exploring these factors, I shall examine the passage in Barbados from the old English model to the new model of insolvency law based on the modern Canadian practice, and assess the strengths and weaknesses in either system. This examination will provide a unique opportunity to trace the evolution of bankruptcy and insolvency practice in general and specifically within Barbados. Ultimately, however, my goal will be to suggest meaningful ways in which the bankruptcy and insolvency practice in Barbados may be enhanced so as to ensure the effective application of the Barbados BIA.

Methodology

In assessing the development and effectiveness of the bankruptcy and insolvency laws of Barbados, I shall adopt a comparative law approach. The bankruptcy and insolvency regime in Barbados, as mentioned above, will be compared against the model of insolvency practice that currently exists in another English-speaking Caribbean country, which is based on the English model of bankruptcy law. Additionally, the system in Barbados will be compared with the practice of bankruptcy and insolvency law in Canada. This comparison will enable me to assess the strengths and weaknesses of the current regime in Barbados, against the backdrop of the former system of bankruptcy practice from which Barbados recently departed and the system that it seeks to emulate.

The laws of Canada were easily chosen for the purposes of comparison as Barbados expressly sought to model its bankruptcy and insolvency reform after Canada’s. In pursuing bankruptcy and insolvency reform, Barbados established a committee to review its bankruptcy laws and retained a Canadian legal practitioner of bankruptcy and insolvency law as a consultant. The legislation prepared, after this consultation, is what led directly to the drafting of the Barbados BIA modelled after the reforms encompassed in Canada under its *Bankruptcy and Insolvency Act* (the Canada BIA).

The bankruptcy and insolvency laws of Jamaica were chosen as a second point of comparison as they have retained the English model of bankruptcy practice that mirrors the system that Barbados formerly utilised. Additionally, the bankruptcy and insolvency laws of Barbados, Jamaica and Canada all share a common history. Barbados, Jamaica and Canada were all, at one point in time, colonies of the British Empire. As such, Barbados, Jamaica and Canada saved

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8 *Ibid* at 7.
9 Barbados was colonized by England in 1624 and attained independence in 1966, whereas Jamaica was under the rule of England from 1655 until it gained independence in 1962. Canada was a colony of England from 1763 until the enactment of the Constitution Act in 1867.
many of England’s laws including those governing bankruptcy and insolvency proceedings. England enacted its first bankruptcy legislation in 1542. Throughout the following centuries the bankruptcy legislation in England was updated, amended and transmitted to its colonies.

Bankruptcy and Insolvency Law in Canada

Between the years of 1869 and 1966, Canada enacted thirteen significant statutes relating to its legislation of the Canadian bankruptcy and insolvency system. These statutes were enacted to address the specific needs of the Canadian society rather than to mimic the laws of England. For example, the Bankruptcy Act (the Canada BA 1919), differed significantly from the legislation in force in England as it governed both individual insolvencies and corporate insolvencies.

The case law developed in Canada in the 20th century suggests what the purpose of bankruptcy law is. The case of Industrial Acceptance Corp. v. Lalonde, supports the longstanding purpose of bankruptcy law, in that its purpose is to facilitate the equitable distribution of the debtor’s assets amongst his proven creditors. The case of Vachon v. Canada, further suggests that another purpose of bankruptcy law is to enable the rehabilitation of a debtor.

Ultimately, Canada enacted the Bankruptcy and Insolvency Act (The Canada BIA). The 1992 legislative reforms that led to the creation of the Canada BIA were influenced by the

12 Bankruptcy Act, SC 1919, c 36.
15 Bankruptcy and Insolvency Act, RSC 1985, c B-3 [Canada Bankruptcy and Insolvency Act].
development of the case law in Canada and were adopted largely in response to the *Report of the Study Committee on Bankruptcy and Insolvency Legislation* (Tassé Report).¹⁶

### Bankruptcy and Insolvency Law in Barbados

Legislators in Barbados sought to reform their bankruptcy model to emphasize the rehabilitation of the debtor, as well as, to achieve the purposes of bankruptcy and insolvency law enunciated by the courts in Canada. To achieve these purposes, Barbados enacted new bankruptcy legislation, which drew its inspiration from, and was heavily based on, the Canada BIA.

Barbados’ first bankruptcy legislation came in the form of the *Bankruptcy Act, 1903*, however, this Act was soon replaced by the much more comprehensive *Bankruptcy Act, 1925* (the Barbados BA).¹⁷ The Barbados BA was based entirely on the laws of England and remained in force for over 75 years. The Barbados BA was amended several times between 1956 and 1982 to effect minor changes to the Act. In 1985, Barbados undertook an extensive reform of its corporate law structures and legislation, and a new *Companies Act* was thus enacted.¹⁸ At the time of the passing of the *Companies Act*, it was anticipated that the Barbados BA, would also be the subject of reform and similarly updated.¹⁹ As a part of the corporate law reform process, the legislators included Part IV of the *Companies Act* that concerns Winding-Up, Insolvency and Liquidation. This Part of the Act provides, among other things, that a receiving order made under the *Bankruptcy Act* may be made against a company, and that the term “debtor” is to be taken to include companies in certain circumstances.²⁰ However, a complete reform of the bankruptcy

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¹⁶ *Study Committee on Bankruptcy and Insolvency Legislation, Report of the Study Committee on Bankruptcy and Insolvency Legislation* (Ottawa: Study Committee on Bankruptcy and Insolvency Legislation, 1970) [Tassé Report].

¹⁷ *Barbados Bankruptcy Act*, *supra* note 3.

¹⁸ *Companies Act*, Chapter 308 of the Laws of Barbados [Barbados *Companies Act*].


²⁰ *Barbados Companies Act, supra* note 18 at s 357(1) and s 357(2).
system in Barbados and a full merging of the systems of personal and corporate insolvencies within one Act, did not occur until several years later in 2001.

Bankruptcy and Insolvency Law in Jamaica

While Barbados updated its bankruptcy laws and now manages corporate and individual insolvencies under the Barbados BIA, Jamaica, like many other English speaking Caribbean countries, has yet to significantly reform its bankruptcy regime. Individual bankruptcies in Jamaica are governed by the Bankruptcy Act (the Jamaica BA), which was enacted in 1880 and updated by various amendments over the subsequent years. This Act is based on the British model of bankruptcy laws, whereas the Companies Act, 2004 is concerned with corporate insolvencies. However, the Private Sector Organization of Jamaica has recently called for reforms within Jamaica’s bankruptcy regime in order to stimulate greater business participation, to cease the punishment of debtors and generally cure the inefficiencies and complexities of the bankruptcy regime. Since 2004, three significant proposals for bankruptcy and insolvency reform have been presented to the Ministry of Justice, which oversees the Office of the Trustee in Bankruptcy. The Office of the Trustee in Bankruptcy was created in 1937 pursuant to the provisions of the Jamaica BA and administers the affairs of insolvent persons.

The reforms suggested include, but are not limited to, the amalgamation of the personal and company bankruptcy and insolvency regimes under the same Act. The reforms also suggest

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21 Bankruptcy Act, 1880 [Jamaica Bankruptcy Act].


23 Two of the proposals were submitted by former Trustees In Bankruptcy Keith Hartley Cooper, “Revision of Insolvency Legislation The Trustee in Bankruptcy’s Review and Proposals” (30 July 2004) and Lijyasu M. Kandekore, “Proposals for Revision of Current Insolvency Legislation” (November 2007) and one of the proposals was submitted by a practicing Attorney-at-Law Nerine A. Small “Reform of Bankruptcy and Insolvency Laws in Jamaica” (18 December 2009).

24 Lijyasu M. Kandekore, “Proposals for Revision of Current Insolvency Legislation” (November 2007) at 42 [Kandekore].
putting in place measures that seek to rehabilitate companies and individual debtors. The suggested reforms also emphasize taking into account the interest of all of the relevant stakeholders in society impacted by a debtor’s insolvency, and the professional development of insolvency practitioners and judges trained to deal with such matters.

In completing this comparative study I shall examine the present state of the bankruptcy and insolvency laws in the three jurisdictions mentioned above. Further, I shall also address the competing policy considerations inherent in both the old and modern bankruptcy regimes, which seek to punish and rehabilitate debtors respectively. The modern system of bankruptcy law is also designed to stimulate the economy through encouraging businesses to take risks as mentioned above and I shall critically examine the impact of this factor on the development of the law.

My thesis shall also include a positive legal analysis that examines the development or evolution of Bankruptcy law in the English speaking Caribbean, paying particular attention to the countries of Jamaica and, of course, Barbados. This will be achieved through an examination of the Barbados BA and the current Barbados BIA. The Jamaica BA shall also be addressed and as the Jamaica BA concerns only individuals, I shall also make reference to Jamaica’s Companies Act, in so far as it provides for corporate insolvencies.

**Thesis Structure**

This paper is set out in 5 main parts. The first chapter discusses the history and development of bankruptcy and insolvency law in Barbados, Canada and Jamaica, which has resulted in the creation of the Acts currently in force in said jurisdictions. I shall also examine the problems encountered with the early bankruptcy regimes in these countries that led to the desire to enact reforms.

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25 *Nerine A. Small “Reform of Bankruptcy and Insolvency Laws in Jamaica”* (18 December 2009) at 14 [Small].

26 *Ibid* at 25.

The second chapter shall focus on the competing policy considerations inherent in the discussion concerning bankruptcy and insolvency law. The Draft Insolvency Bill prepared by the Caribbean Law Institute in April 1994 (CLI Draft Insolvency Bill), containing suggested reforms for Caribbean countries will be considered, as well as, the various proposals for reform submitted recently in Jamaica that are referred to above. The Tassé Report prepared in 1970, that focused on bankruptcy reform in Canada and addressed the policy considerations referred to above, shall also form part of this discussion.

The third chapter of my thesis shall involve a critical analysis of the 1925 and 2001 bankruptcy statutes of Barbados. It will further examine how these statutes deal with the policy considerations mentioned above and how they address the issues of creditor protection and debtor relief. I shall also discuss how Jamaica and Canada deal with these issues.

The fourth part of my paper shall illustrate how the Barbados BIA works in practice. It shall highlight what I consider to be the deficiencies that lead to the Act’s ineffectiveness. I will illustrate how the lack of accompanying rules, regulations or subsidiary legislation hinders the effectiveness of the Barbados BIA. However, I shall also look to external factors beyond the scope of the Act, and assess their impact on the administration of bankruptcies and insolvencies in Barbados. Factors such as the limited resources available in Barbados, including the availability of Trustees and judges trained in dealing with bankruptcies, will be addressed in this part.

The fifth and final part of my thesis shall include my conclusion and recommendations. Following the analysis conducted in the previous parts, my conclusion will offer suggestions for the reform of the bankruptcy and insolvency practice of Barbados that may eliminate the inefficiencies in the system.
CHAPTER ONE

1. The History of Bankruptcy and Insolvency Law and Practice in Barbados, Canada and Jamaica

1.1 Introduction

Bankruptcy and Insolvency law and practice in Canada, Barbados and Jamaica all initially derived from the English model of bankruptcy law. The systems of bankruptcy and insolvency law and practice in these three countries have evolved to address the particular needs of each jurisdiction. Canada and Barbados have enacted reforms that have significantly altered the manner in which insolvency law is practiced. Jamaica, on the other hand, has not implemented such sweeping reforms and the model of bankruptcy and insolvency law practiced there still closely resembles the British model.

In this chapter, I shall briefly discuss the history of bankruptcy and insolvency law in Barbados, as well as, Canada and Jamaica. An understanding of the history and development of bankruptcy and insolvency law is essential in identifying and assessing the impact of the reforms made to date. An understanding of this history also assists in illustrating the ways in which the current laws may still be deficient in accomplishing their goals. As there have been many texts and treatises that discuss the history of bankruptcy and insolvency law in Canada,28 I will not dedicate much of this thesis to revisiting this history. I shall, however, seek to give a more detailed account of the history of bankruptcy law in Barbados and, to a lesser extent, Jamaica.

28 Most notably, the two texts referred to earlier Duggan, supra note 11 and Wood, supra note 10.
1.2 The History of Bankruptcy and Insolvency Law and Practice in Canada

As discussed at pages 4 – 5 of this thesis, Canada originally adopted its laws regarding bankruptcy from England. During the 20th century, Canada embarked on a process of reform that transformed its laws into a system that not only seeks to secure the debts owed to creditors but also attempts to rehabilitate debtors. The Tassé Report gives a detailed account of the history of bankruptcy and insolvency law in Canada from 1869 – 1966.29

By 1966, Canada had three major Acts regarding the insolvency regimes in operation that were available for use by most insolvent debtors. The three major Acts referred to included the Winding-Up Act 1882,30 the Companies’ Creditors Arrangement Act 1933,31 and the Bankruptcy Act 1949 (the Canada BA 1949).32

The Winding-Up Act specifically addressed corporate insolvencies and, as the name suggests, made provisions for the winding-up of insolvent companies. The Companies’ Creditors Arrangement Act 1933, was a piece of legislation designed to enable insolvent corporations to restructure, satisfy debts owed to creditors and avoid bankruptcy.

The Canada BA 1949 built upon the foundation laid by the Canada BA 1919. While the Canada BA 1919 was based largely on the English model, it differed in a number of ways. Unlike the English model the Canada BA 1919, addressed both personal and corporate insolvencies. Roderick J. Wood lists additional areas where significant differences lie in the Canadian legislation as follows:

“...it was deliberately structured so as to reduce the occasions where an application to the court was needed. An individual who wished to make a voluntary assignment into bankruptcy was not required to bring a bankruptcy

29 Tassé Report, supra note 16 at 13 – 25.
30 Winding-Up Act, SC 1882, c 23.
31 Companies’ Creditors Arrangement Act, SC 1932-33, c 36.
32 Bankruptcy Act, SC 1949 (2nd Session) c 7.
petition before the court. As well, the Canadian model did not embrace official administration to the same degree as the English Act, and official receivers in Canada were not given investigative responsibilities comparable to those in England."\textsuperscript{33}

The Canada BA 1949 was designed to simplify the bankruptcy legislation.\textsuperscript{34} Further, the 1949 Act modified the previous legislation by adding a number of provisions. Most notably, the Bankruptcy Act of 1949 added provisions for debtors’ proposals and the automatic discharge of debtors. In 1966, the Canada BA 1949 was again amended.\textsuperscript{35} The amendments made at this time included new measures relating to non-arms’ length transactions. Additionally, the Superintendent of Bankruptcy was given greater power to investigate instances of debtor fraud and other offences under the Act.

Significant reform in Bankruptcy law in Canada next came in the form of the Canada BIA, which became law in 1992 following the recommendations made in the Tassé report. The Canada BIA included provisions in the bankruptcy legislation, which for the first time addressed consumer proposals and required mandatory credit counselling for individual insolvent debtors.\textsuperscript{36} The Canada BIA also established that first time bankrupts could receive an automatic discharge after nine months.\textsuperscript{37} While these provisions may be viewed as reforms designed to primarily assist the debtor, the legislation also afforded certain creditors an added measure of protection by implementing section 81.1(1). This section provides unpaid sellers of goods with a super priority claim in bankruptcy.

\textsuperscript{33} \textit{Wood, supra} note 10 at 33.

\textsuperscript{34} \textit{Tassé Report, supra} note 16 at 17.

\textsuperscript{35} The Bankruptcy Act was amended in 1966 by \textit{An Act to Amend the Bankruptcy Act} SC 1966-67, c 32.

\textsuperscript{36} Division II Consumer Proposals of the Canada BIA makes provisions for consumer proposals and section 157.1 (1) of the Canada BIA mandates that the Trustee shall provide counselling.

\textsuperscript{37} \textit{Canada Bankruptcy and Insolvency Act, supra} note 15 at s 168.1.
In 1997, amendments were made to the Canada BIA. The Canada BIA was amended to insert provisions regarding the surplus income of insolvent debtors. Further, the Act was amended to provide an exemption for student loans in that government student loans became non-dischargeable debts pursuant to section 178 of the Canada BIA. The 1997 amendments also addressed the insolvency of securities firms and issues pertaining to cross border insolvencies. Finally, in September 2009, amendments to the Canada BIA made in 2005 and 2007, respectively, came into force. These amendments further reformed the areas of relief for unpaid suppliers and the discharge from student loans. Additionally, a definition for “transfer at undervalue” was included in the definition section of the Act and section 96 of the Act established that such transfers may be void as against the Trustee. Finally, these amendments established a super priority in favour of employees.

The administration of bankruptcies and insolvencies under the Canada BA 1919 was creditor-driven. The creditors had a great amount of control over insolvency proceedings as they made the assignments into bankruptcy and had the power to choose the Trustees. This represents one of the biggest problems with the old legislation that led to the desire to reform the insolvency system. From as early as the 1949 Amendments the Canadian legislature began to remove this imbalance that clearly favoured creditors at the expense of debtors. Measures such as the right to make debtors’ proposals and the automatic discharge introduced in the Canada BA 1949, gave the debtor a certain level of control over his destiny and the assurance that he would be discharged from bankruptcy in certain situations. The need for reform was also influenced by the desire to have a greater level of control of the insolvency system governed and regulated by a body other than the creditors. Creditor apathy or self-interest in supervising the administration of

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38 Bankruptcy and Insolvency Act, RSC 1985, c B-3 as amended by SC 1997, c 12.
39 Canada Bankruptcy and Insolvency Act, supra note 15 at s 68.
40 Ibid at Parts XII and XIII, respectively.
41 Bankruptcy and Insolvency Act, RSC 1985, c B-3, as amended by SC 2005, c 47 and SC 2007, c 36, respectively.
42 Canada Bankruptcy and Insolvency Act, supra note 15 at s 81.3 and s 81.4.
the insolvent’s estate was one factor that led to granting the Superintendent of Insolvency greater power.  

Many of the reforms that followed throughout the 20th and 21st centuries sought to mitigate the harshness of the 1919 Act, which was viewed as a significant deficiency that necessitated reform. Debtors were thus offered counselling and added protection under the Canada BIA to assist in their rehabilitation. However, measures were also put in place to protect the interests of creditors. Unpaid sellers of goods, employees and government bodies were granted specific priorities or rights in insolvency matters. Therefore, it can be argued that the current legislation represents a compromise between the protection and rehabilitation of debtors and the protection of the interests of creditors. The legislation appears to encourage debtors to take risks in business to facilitate economic growth as opposed to punishing them for taking risks and failing. Likewise the legislation appears to encourage creditors to take risks and engage in business with debtors, with the assurance that should things go bad their interests will be protected by legislation.

1.3 The History of Bankruptcy and Insolvency Law and Practice in Barbados

Barbados’ first significant piece of legislation concerning bankruptcy law came in the form of the Barbados BA enacted in 1925. The Governor, Council and Assembly for the Island of Barbados enacted the Act while it was still a colony and the Act essentially represented a restatement of the bankruptcy law of England at the time. The Barbados BA related solely to individuals whereas Barbados’ first Companies Act, enacted in 1910, addressed corporate insolvencies.

The Barbados BA was first amended in 1956 to include a new section 119 which granted the legislature the power to make rules to effect the carrying out of the purposes of the Act. This amendment was enacted by the Supreme Court of Judicature Act, 1956.

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43 Tassé Report, supra note 16 at 64.
45 This amendment was enacted by the Supreme Court of Judicature Act, 1956.
Barbados BA was again amended two years later. The purpose of this amendment was to include a provision in the Barbados BA that would preclude bankrupt individuals from sitting in the House of Parliament. The introduction of this provision served to copy section 32 of England’s Bankruptcy Act, 1883.

An amendment was further made to the Barbados BA in 1961 to include a marginal note to accompany section 119 referred to above. The Bankruptcy (Amendment) Act, 1975, however, made more substantial amendments to the Barbados BA. The amendments made in 1975 affected section 34 of the Barbados BA, which addressed the priority of debts. Section 34 (b) of the Act, as originally drafted, provided that all wages not exceeding £50 and owed to servants or clerks, for services rendered four months prior to the making of a receiving order, were to be paid by the debtor. This was second in priority, only to the payment of local rates and taxes. Section 34 (c) provided that labourers or workmen were to be paid up to £25 for work completed two months prior to the making of the receiving order. The 1975 Amendments removed the £50 and £25 restrictions from sections 34 (b) and 34 (c), respectively. The 1975 Amendments further added a section 34 (e) to the Barbados BA that required debtors to pay all amounts due as severance payments under the Severance Payments Act.

Subsequently, in 1981, a further amendment was made to section 34 of the Barbados BA. The 1981 Amendment added a section 34 (10). This section provided that all taxes due to the Crown and contributions due under the National Insurance and Social Security Act had priority over all debts owed by the bankrupt.

The Companies Act enacted in 1982 later replaced the Companies Act of 1910. The Companies Act of 1982 was enacted to revise and amend the law relating to companies and to

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47 An Act to Amend and Consolidate the Law of Bankruptcy 1883 (46 & 47 Vict, c 52).

48 Section 5 of the Courts (Consequential Amendments) Act, 1961, provided that the words “Power to make rules” be inserted as a marginal note next to s 119.


50 Barbados Companies Act, supra note 18.
provide for related and consequential matters.\textsuperscript{51} While the Companies Act of 1910 made provisions for the winding-up and payment of debts of insolvent companies, the 1982 Act bore added significance for bankruptcy and insolvency practice in Barbados in two regards. First, the Companies Act Part II, Protection of Creditors, Division C: Receivers and Receiver-Managers, legislated for the duties and functions of receivers and receiver-managers appointed under an instrument between creditors and debtors, as well as court appointed receivers and receiver-managers. Part II of the Companies Act created a framework by which failing corporate bodies could have a receiver appointed. The receivers’ functions were limited to taking possession of the property of the company and paying any debts and liabilities incurred by the company, and securing the security interest of the person appointing the receiver.\textsuperscript{52} Receiver-managers were entitled to carry on the business of the corporation in order to protect the security interest of the person who appointed the receiver-manager.\textsuperscript{53} Thus, the appointment of a receiver or receiver-manager could assist a company that was insolvent or within the realm of insolvency in satisfying its debts and avoiding liquidation.

The Companies Act of 1982, however may be of greater significance in that it expressly stated under Part IV Winding Up, Division A: Insolvency and Liquidation, that the provisions of the Barbados BA apply to companies. Section 357 (1) of the Companies Act of 1982 states that a receiving order made under the Barbados BA may be made against a company. Strangely, while the Companies Act of 1982 states that for the purposes of the Barbados BA, the term “debtor” in section 3 (3) includes a company, there was no such section 3 (3) in the Barbados BA. There was, however, a section 3 (2) that defined “debtor” as including a person who has committed an act of bankruptcy and was present, ordinarily resident, carrying on business or a member of a firm or business, which carried on business in Barbados. In any event, it is clear that Parliament intended that the provisions of the Barbados BA were to apply to corporate insolvencies as

\textsuperscript{51} Ibid at 1.

\textsuperscript{52} Ibid at s 276.

\textsuperscript{53} Ibid at s 277.
section 357 (3) provided that a company commits an act of bankruptcy in all of the situations outlined in section 3 (1) of the Barbados BA.\textsuperscript{54}

However, it was not until the passing of the Barbados BIA that personal and corporate insolvencies were addressed within one single Act. The Barbados BIA also included a number of other reforms that changed the manner in which bankruptcy and insolvency practice was managed. The role of the Official Receiver was abolished and the role of the Trustee in Bankruptcy was significantly redefined. The Trustee is now required to counsel individual bankrupts and assist the debtor in preparing his proposal, as well as carry out a number of functions listed under Part IX of the Barbados BIA. Along with the role of the Trustee, the Act also facilitated the making of debtors’ proposals and set out the procedures to be followed by the Trustee, debtor, creditors and the Court after a proposal has been made.\textsuperscript{55} Another significant reform came in the form of the creation of the Office of the Supervisor of Insolvency, which was created to supervise the administration of all bankruptcies and insolvencies in Barbados.\textsuperscript{56} In addition to including a new provision permitting the automatic discharge of first time bankrupts the Barbados BIA is similar to the Canada BIA in many other aspects.\textsuperscript{57} The Barbados BIA followed the precedent set by the Canada BIA by instituting provisions relating to the surplus income of individual bankrupts,\textsuperscript{58} reviewable transactions,\textsuperscript{59} a priority for the wages of employees,\textsuperscript{60} and international insolvencies.\textsuperscript{61}

\textsuperscript{54} Sections 3 (1) (a), (b), (c), (e), (f), (g), (h) and (i) of the Barbados BA, which concern various acts of bankruptcy may all apply to companies. However, section 3 (1) (g) relates to debtors who depart the Barbados or leave their dwelling house with the intent to defeat or delay his creditors and thus, is not relatable to companies.

\textsuperscript{55} Barbados Bankruptcy and Insolvency Act, supra note 1 at Part V and Part VI deal with proposals and the administration of estates respectively.

\textsuperscript{56} Ibid at s 161.

\textsuperscript{57} Ibid at s 146.

\textsuperscript{58} Ibid at Part VIII s 39.

\textsuperscript{59} Ibid at s 75.

\textsuperscript{60} Ibid at s 113.

\textsuperscript{61} Ibid at Part XI
It does not appear as though the Barbados BA was used much in practice. The Supreme Court of Judicature Registry does not contain any records regarding applications made by individuals under the Act and historically companies have entered into receivership rather than rely on the provisions of the Barbados BA. Therefore, the bankruptcy reform undertaken in Barbados seems to be predicated more on a desire to update the law in accordance with the new international norm, as opposed rectifying any actual problems encountered in practice. Therefore while the insolvency system in Barbados initially reflected the law of England it has now developed into a practice that is quite distinct from that which remains in force in England. Personal and corporate bankruptcy and insolvency laws are now streamlined and governed by one statute. Additionally, Trustees have been given greater powers, responsibilities and duties to ensure that both the debtors’ and the creditors’ interests are served during bankruptcy and insolvency proceedings. The Office of the Supervisor of Insolvency was also established to oversee the conduct of insolvencies and particularly the actions of Trustees and receivers to ensure that they are acting in accordance with the legislation. As with the Canadian reforms, the Barbados legislation now offers greater protection for insolvent debtors and actively seeks to rehabilitate the debtor. The Barbados BIA accomplishes this by allowing the debtor to make a proposal to his creditors and outlining in detail the procedure through which the debtor may satisfy his debts and be discharged from bankruptcy. The Barbados BIA also mandates that the debtor must undergo credit counselling and by these cumulative measures the Act grants the debtor the opportunity to free himself of his debts and have a fresh start.

The Barbados BIA, encourages businesspeople to take risks in creating or managing a business as it ensures that insolvency will not lead to complete financial ruin from which a debtor cannot return. However, the Act also protects creditors from the fraudulent acts of debtors including the granting of preferences and the transferring of property at undervalue. The Barbados BIA also offers added protection to employees by itemising a scheme of distribution that grants them a priority over most unsecured creditors.
1.4 The History of Bankruptcy and Insolvency Law and Practice in Jamaica

The Jamaica BA and the Companies Act of 2004 govern bankruptcy and insolvency law and practice in Jamaica. The Jamaica BA deals solely with personal bankruptcies and is based largely on the 1883 Bankruptcy Act of England. The Jamaica BA has been amended on a number of occasions since its enactment. The 1937 amendment ranks as one of the more significant amendments. The 1937 amendment created the Office of the Trustee in Bankruptcy, a department of the Ministry of Justice charged with the responsibility of administering bankruptcies. Apart from further amendments in 1993, vesting greater power in the Trustee in Bankruptcy, the basic provisions of the Jamaica BA have remained largely the same since the Act’s inception.

Prior to the passing of the Companies’ Act of 2004, corporate insolvencies were governed by the Companies Act of 1965. This Act fully adopted the English position with respect to the winding-up of companies and the English Companies (Winding-Up) Rules of 1949 are given full effect in Jamaica. An examination of the Companies’ Act of 2004 reveals that it has not significantly altered the position of the law in Jamaica with respect to corporate insolvencies. Therefore, the administration of corporate insolvencies in Jamaica still closely resembles the position adopted from England under the 1965 Companies Act.

Jamaica’s bankruptcy and insolvency regime has not been significantly reformed since its inception. The system of bankruptcy and insolvency practice in Jamaica currently resembles the position originally adopted from England that places emphasis on the satisfaction of the creditors’ interests. The sole purpose of the insolvency legislation appears to be focused on

62 Keith Hartley Cooper, “Revision of Insolvency Legislation The Trustee in Bankruptcy’s Review and Proposals” (30 July 2004) at 3 [Cooper].
63 Jamaica Bankruptcy Act, supra note 21 at 14.
64 The Companies (Winding-up) Rules, 1949, 1949 No 330 (L. 4).
65 Cooper, supra note 62 at 3.
66 Kandekore, supra note 24 at 10.
ensuring that the creditors receive all of the money that they are owed or whatever portion is agreed upon between the parties and not the rehabilitation of the debtor. The role of the Trustee as defined under the sections 78 – 98, *Administration of a Debtor’s Estate by the Trustee, Duties and Powers of the Trustee* of the Jamaica BA establishes an adversarial relationship between the Trustee and the debtor as the Trustee is the agent of the creditors. The Trustee’s duty is clearly not to assist the debtor but to secure the interests of the creditors.

### 1.5 Concluding Remarks

The law of bankruptcy and insolvency in Barbados and Canada has developed into a system designed to rehabilitate debtors and protect the financial interests of creditors. The bankruptcy and insolvency regime in Jamaica, however, has not experienced a similar transformation and remains focused on ensuring that the debts owed to creditors are satisfied. Additionally, the insolvency laws of Barbados and Canada go beyond the principles of rehabilitation and repayment of debts. The Bankruptcy and Insolvency Acts seek to promote risk taking in business and the creation of new businesses with the legislative regimes acting as a safety net should an individual or company become insolvent. Chapter Two will now go on to discuss the policy considerations that led to the reforms in Barbados in greater detail.
CHAPTER TWO

2. The Underlying Policy Considerations That Influence Bankruptcy and Insolvency Law

2.1 Introduction

The Senate debates from Barbados reveal the policy considerations that led to the passing of the Barbados BIA. Apart from the desire to simplify the previous bankruptcy and insolvency regime, the Barbados BIA was enacted to further a number of political, economic and social policy considerations that the legislature viewed as necessary in updating the country’s laws. The chief political policy consideration revolved around the efficient public administration of bankruptcies and insolvencies in Barbados and correcting the imbalance that existed within the old laws, which tended to favour the interests of creditors over debtors. From an economics perspective the Barbados BIA was influenced by a desire to encourage the creation of new businesses and to promote greater risk taking by existing businesses, in order to stimulate economic growth within the country. Finally, it was hoped that the provisions of the Barbados BIA would act to remove the social stigma that generally attaches to insolvent or bankrupt debtors in Barbados.

In this chapter I shall discuss the origins of the political, economic and social policy considerations noted above. In doing so I shall make reference to the Tassé Report, the Canada BIA and the CLI Draft Insolvency Bill, which preceded the Barbados BIA and addressed reforms based on similar considerations. Additionally, I shall also make reference to the proposed reforms of Jamaica’s bankruptcy and insolvency system, in order to assess whether any other Caribbean jurisdiction shares the policy considerations contemplated in Barbados.
2.2 The Rehabilitation of Debtors vs. The Equitable Treatment of Creditors

Senator The Honourable G. S. H. Murray opened the Senate debates concerning the passing of the Barbados BIA. Senator Murray discussed the intent of the Barbados BIA stating that the Act was drafted to improve the management of bankruptcy and insolvency matters in Barbados.67 The Honourable Senator also emphasised that the Barbados BIA was designed to assist in the rehabilitation of debtors:

“This new legislation is meant to redress that imbalance to create a greater balance between the interests of the creditor and the interests of the debtor. This is all part of the Act which has a kernel that seeks to address the whole question of rehabilitation of persons who might need to restructure their business and give them a second chance to provide themselves with a worthwhile living, and to operate in a legitimate activity and not be viewed with suspicions thereafter.”68

Senator Murray went on to suggest that the Barbados BA placed little emphasis on restructuring debtors’ businesses or rehabilitating debtors and instead favoured the interests of creditors.69 During the debates members of the Senate identified a number of areas where the Barbados BA favoured creditors. Senator The Honourable J. E. D. Williams noted that the previous system of insolvency law permitted creditors to appoint receivers to manage the affairs of debtors. Senator Williams further added that in many instances these receivers were free from requirements or obligations, which would serve to regulate their conduct and this enabled receivers to act in their own interests to the detriment of the debtors.70 Senator The Honourable K. D. Symmonds succinctly characterised the old system of bankruptcy and insolvency practice in stating that when debtors became insolvent they “fell into the hands of creditors and were dictated to”.71

68 Ibid at 4.
69 Ibid at 5.
70 Ibid at 10.
71 Ibid at 13.
The Canada BIA upon which the Barbados BIA is based also sought to make the system of bankruptcy and insolvency law in Canada more equitable and to adjust the imbalance that existed between creditors and debtors. The Tassé Report that led to the drafting of the Canada BIA identified instances where the previous legislation unjustly favoured creditors. The Tassé Report specifically addressed the issue of creditor control as an area that required reform. Under the Canada BIA creditors could essentially control the bankruptcy process as they had the power to appoint and substitute trustees and thus greatly influence proceedings.\textsuperscript{72} The rehabilitation of debtors was clearly a focal policy consideration that influenced the drafting of the Tassé Report and subsequently the Canada BIA.\textsuperscript{73} However, when contemplating this consideration, the Study Committee on Bankruptcy and Insolvency Legislation also emphasised that creditors too needed to be treated equitably. The Tassé Report stated that the debtor’s estate should be maintained and preserved for the equal benefit of all creditors and that creditors should be protected from fraudulent debtors and over-reaching creditors.\textsuperscript{74}

The Barbados Senate debates further reveal that the Barbados BIA was modelled after the Canada BIA as opposed to the CLI Draft Insolvency Bill as the Draft Insolvency Bill was perceived to unduly favour creditors.\textsuperscript{75} The CLI Draft Insolvency Bill was drafted with the main purpose of updating Caribbean insolvency regimes and establishing a model law that Caribbean countries could adopt. However, the policy consideration of rehabilitating debtors while protecting creditors is not immediately apparent within the provisions of the Bill or its explanatory memorandum.\textsuperscript{76}

The CLI Draft Insolvency Bill established a Debtor-in-Possession regime under Part II and a bankruptcy regime under Part III of the Draft Bill titled “Liquidations”. Although the CLI Draft Insolvency Bill included provisions that established an automatic stay of proceedings in favour

\begin{itemize}
\item \textsuperscript{72} Tassé Report, supra note 16 at 63 – 64.
\item \textsuperscript{73} Ibid at 87.
\item \textsuperscript{74} Ibid.
\item \textsuperscript{75} Barbados Senate Official Report of Debates, supra note 2 at 4.
\item \textsuperscript{76} Caribbean Law Institute Draft Insolvency Bill, (Barbados: Caribbean Law Institute, 1994) page i [Draft Insolvency Bill].
\end{itemize}
of debtors upon the filing of petitions under Parts II and III of the Draft Bill, the provisions of the Draft Bill continued to favour creditors’ interests to a large extent. For example, under Part II of the Draft Bill that concerns reorganizations, sections 40 – 43 outline the role and powers of the Administrator, Trustee and Creditor Committee. Under the provisions of the Draft Bill each of these offices seemingly exists for the purpose of policing the conduct of the Debtor-in-Possession as opposed to offering the debtor any assistance with continuing in business or aiding in his rehabilitation or reorganization.

In Barbados, as in Canada, the legislature made reference to protecting the interests of creditors. However, the focus of the debates was clearly on conveying the policy statement that the Barbados BIA would rehabilitate debtors and mitigate the harshness of the previous regime, which overwhelmingly favoured creditors.

2.3 Encouraging the Creation of New Businesses and Encouraging Businesses to Take Risks

Between the years of 1994 and 2001, Barbados introduced the Small Business Development Act and a number of initiatives designed to encourage the growth of small businesses and the business sector in general. A similar economic policy consideration underscored the drafting and implementation of the Barbados BIA. The legislature recognized that small businesses were essential in generating significant business activity and contributing to the gross domestic product of the country. When discussing the potential impact of the reforms encapsulated in the Barbados BIA Senator Murray added that:

77 Ibid at s 13.
79 During this period the Fund Access agency created under the provisions of the Small Business Development Act Chapter 318C of the Laws of Barbados, the Urban Development Commission and the Rural Development Commission were established. As a part of their mandates these agencies approved and granted a number of loans to assist in the capitalization of new businesses.
“It was felt that rectifying this situation would provide all business in Barbados with a legal and regulated environment which would influence international competitiveness and provide a measure of comfort to investors whose business may have to be re-engineered and restructured as a result of insolvency which may have been caused by certain uncontrollable factors.”\textsuperscript{81}

At the time of the drafting of the Barbados BIA it was hoped that the regime change implemented by the Act would encourage entrepreneurs to create new businesses and take risks with the knowledge that the Act offers a greater measure of protection should they fail. Similarly, investors, creditors and other stakeholders would be comforted by the provisions of the Barbados BIA that also offer these parties protection and a means of recovery should a debtor’s business become insolvent. The enhanced protections were, therefore, clearly designed to stimulate economic growth by encouraging the creation of and the investment in, new businesses.

The economic policy considerations that promoted bankruptcy and insolvency law reform in Canada largely concerned the preservation of public confidence in the country’s credit system.\textsuperscript{82} However, the United Nations Commission on International Trade Law Legislative Guide on Insolvency Law (UNCITRAL Guide) addressed the issue of economic growth in a manner similar to Barbados.\textsuperscript{83} The UNICTRAL Guide was drafted to establish an efficient and effective system of bankruptcy and insolvency laws that could be relied upon by jurisdictions seeking to reform their laws.\textsuperscript{84} The promotion of economic growth and stability is the first key objective of insolvency law noted in the UNCITRAL Guide.\textsuperscript{85} Therefore, an ideal bankruptcy and insolvency regime as contemplated by the UNICTRAL Guide should operate to provide certainty in the market and create an environment that is conducive to the creation and reorganization of

\textsuperscript{81} Ibid at 5.
\textsuperscript{82} Tassé Report, supra note 16 at 87.
\textsuperscript{84} Ibid at 1.
\textsuperscript{85} Ibid at 10.
businesses. This economic policy consideration is perhaps the most important factor that led to the reform of the bankruptcy and insolvency system in Barbados.

During the latter part of the 20th century Barbados was aggressively seeking to export services and products throughout the region and the world as a means of earning foreign exchange. It was, therefore, necessary to establish a framework of laws, including bankruptcy and insolvency laws, which facilitated the growth of new enterprises. Similarly, Jamaica has placed emphasis on bankruptcy and insolvency reform as a means of encouraging entrepreneurs to take risks and create new business opportunities. The most recent proposal concerning bankruptcy reform in Jamaica recognizes that countries with modern bankruptcy and insolvency regimes or “best practices” place emphasis on achieving a number of objectives. One such objective is to “create a climate conducive to entrepreneurship and responsible risk taking while preserving commercial prudence and financial discipline”, 86 which is similar to what Barbados was seeking to achieve in passing the Barbados BIA.

2.4 Removing the Stigma of Bankruptcy

The final policy consideration that influenced the reform of the bankruptcy and insolvency regime in Barbados was the desire to remove the stigma that attaches to bankrupt individuals and insolvent companies. The Tassé Report made only a brief mention of the stigma of bankruptcy, as the removal of this stigma was not a major policy consideration that necessitated the reforms brought about by the Canada BIA. By 1970, it appears as though there was a shift in Canadian society whereby the public generally ceased viewing bankruptcy with shame, but rather saw it as a viable answer to their financial problems. 87

The stigma of bankruptcy continued to exist in Barbados at the time of the drafting of the Barbados BIA. The Senate debates suggest that persons who failed in business were generally

86 Small, supra note 25 at 11.
87 Tassé Report, supra note 16 at 56.
viewed negatively for the rest of their lives.\textsuperscript{88} The legislature, however, did not necessarily view insolvency as a reflection of, or a stain on an individual’s or a corporation’s integrity.\textsuperscript{89} Economic failure could be attributed to a number of uncontrollable circumstances. Therefore, the legislature hoped that the provisions of the Barbados BIA would offer a second chance to debtors in distress and rehabilitate them to a point where the stigma of bankruptcy no longer affected them. Senator Symmonds summed-up this social policy consideration in the following manner:

“In a real sense there is a very punitive concept behind the old legislation. What is being attempted here is to bring Barbados into a climate where you are not seen as a social scourge because your business has failed, but rather brings us to a point where we readily have a society that appreciates that the person has failed and gives the person a second chance. It is, therefore, in a broad sense an effort at legislative social transformation.”\textsuperscript{90}

Senator The Honourable D. D. Marshall mentioned that very few applications for relief were brought under the Barbados BA.\textsuperscript{91} In fact, I could not locate any records at the Supreme Court Registry concerning applications made to the Court under the Barbados BA. It is reasonable to surmise that the stigma of bankruptcy was one of the contributing factors that deterred debtors from seeking any measure of relief under the old legislation. In any event, removing the stigma that affects bankrupts and limits their willingness to rely on the provisions of the legislation was clearly a significant policy consideration that influenced reform. The 2004 Proposal for reform of the bankruptcy and insolvency regime in Jamaica also recognised the issue of the social stigma that attaches to persons in the Caribbean who are deemed bankrupt in accordance with the terms of the old bankruptcy legislation. As with Barbados, the parties seeking reform of the laws believe that there is a sense of condemnation based on Victorian ideals that accompanies

\textsuperscript{88} Barbados Senate Official Report of Debates, supra note 2 at 2.

\textsuperscript{89} Ibid.

\textsuperscript{90} Ibid.

\textsuperscript{91} Ibid at 14.
bankruptcy under the old English system of bankruptcy and insolvency practice. Therefore, Jamaica is now seeking to implement reforms that also aim to rehabilitate debtors and their images as opposed to punish debtors and forever stain their reputations.

2.5 Concluding Remarks

A reading of the Senate debates from Barbados identifies the major political, economic and social policy considerations that influenced the reform of the bankruptcy and insolvency regime in that country. The legislature anticipated that the new Act would rehabilitate debtors and at the same time protect creditors from fraud. The Barbados BIA was also clearly intended to act as a catalyst for the creation of new businesses and ultimately, it was hoped that the provisions of the new legislation would serve to remove the stigma of bankruptcy that had existed for over a century. These considerations were not unique to Barbados. A review of the Tassé Report reveals that similar considerations necessitated reform of the Canadian bankruptcy and insolvency system. Additionally, the reforms presently being contemplated within Jamaica also demonstrate a need for reform motivated by similar policy considerations. Having identified the policy considerations that underscored the reforms, Chapter Three shall now go on to investigate whether the provisions of the Barbados BIA actually reflect or give effect to these considerations.

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92 Cooper, supra note 62 at 4.
CHAPTER THREE

3. Do The Bankruptcy and Insolvency Laws of Barbados Fulfill the Policy Considerations underlying the Law?

3.1 Introduction
As discussed in the previous chapter, there were three major policy considerations that the legislature sought to address in reforming the bankruptcy and insolvency laws of Barbados. These considerations were political, social and economic in nature. The Barbados BIA incorporated a number of provisions designed to pursue the considerations contemplated by the legislature. A number of the legislative provisions are pellucid in their intent to rehabilitate debtors or achieve the other policy goals mentioned, whereas some provisions are implicit. In this chapter I shall critically examine the Barbados BIA to ascertain whether and to what extent the provisions of the Act further the goals of parliament. In conducting my analysis I shall also make reference to the Canada BIA to examine how this statute addresses similar concerns.

3.2 The Political Considerations Within the Barbados BIA
The Barbados BIA was enacted for the broad purpose of reforming the flawed and inefficient system of bankruptcy and insolvency law that existed under the Barbados BA. The Barbados BIA enacted new proposal provisions that established a Debtor-in-Possession scheme and instituted new laws governing personal and corporate bankruptcies in order to fulfill the policy considerations discussed in Chapter Two above. I shall now discuss the role that the Barbados BIA plays in furthering the political policy considerations of rehabilitating debtors and protecting creditors.
Proposals

Section 12 of the Barbados BIA identifies who may make a proposal under the Act. Permitting debtors to prepare proposals for the approval of creditors outlining the manner and extent to which they intend to satisfy their debts, encourages the parties to compromise and agree on a realistic method of recovery. Section 17 of the Barbados BIA, which copies verbatim section 50.5 of the Canada BIA, requires the Trustee to assist the debtor in the preparation of the proposal. The Trustee is, therefore, required to act as an agent of the debtor, assisting him in the satisfaction of his debts and his rehabilitation. The proposal process thus facilitates the rehabilitation of debtors as it ensures that debtors can satisfy their debts pursuant to the terms of the proposal and be quickly discharged of their debts. The proposal provisions also enable corporate debtors to remain in the possession of an insolvent company and to continue in business once the debts have been satisfied. Additionally, the Trustee under the Barbados BIA proposal provisions ensures that the creditors recover as much of the debts owed to them as they can in the circumstances. A debtor, therefore, is not condemned to an inevitable fate of bankruptcy but can make a proposal for payment that simultaneously satisfies his debts and safeguards his future. Much like the proposal provisions in the Canada BIA, under the Barbados BIA the creditors and the Court must approve any proposal made pursuant to the Act.

Section 36 of the Barbados BIA further paves the way for the discharge of proceedings by providing that where all of the terms of the proposal have been met a certificate of performance is to be prepared by the Trustee and delivered to the Supervisor of Insolvency. This provision for discharge also ensures the rehabilitation of debtors. Allowing for a speedy system of discharge once all debts are paid permits a debtor to have his outstanding debts eliminated in a timely manner. The debtor may then continue to conduct his personal affairs or the affairs of a corporate debtor without fear of creditors seeking to enforce further debts. The discharge provision regarding proposals assists in the rehabilitation of debtors as it allows them to escape insolvency.

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93 Section 12 of the Barbados BIA is based on section 50 of the Canada BIA. Both sections state that, an insolvent person, a receiver, a liquidator of an insolvent person’s property, a bankrupt and a trustee of the estate of a bankrupt may make a proposal.

94 The statutory scheme regarding the proposal process is outlined in detail in Part III of the Canada BIA and Part V of the Barbados BIA.
and quickly re-enter the financial or economic playing field. The system of discharge also promotes the legislature’s goal of instituting a bankruptcy and insolvency regime that operates efficiently. Once the Supervisor of Insolvency prepares the certificate of performance the debtor is free to be discharged from insolvency and have his or the company’s debts wiped clean. This system appears to be a rather efficient legislative scheme designed to expedite an insolvent debtor’s discharge.

Debtors have prepared proposals in four of the five insolvency matters brought under the Barbados BIA. In the insolvency matter of *Grant Hotels Inc.* the Trustee had initially anticipated that the funds achieved through an asset sale of the debtor company, as contemplated by the Creditors’ Proposal, would be sufficient to satisfy the proven claims of the unsecured creditors in their entirety. However, the Further Amended Creditors’ Proposal ultimately approved by the creditors required that the majority shareholding in the company be sold to a third party in order to expedite the satisfaction of the claims. This proposal enabled Grant Hotels Inc. to continue in operation under new ownership and settle the debts of the unsecured creditors in keeping with the goal of the rehabilitation of debtors and the satisfaction or protection of creditors. However, while the unsecured creditors have been paid, further litigation remains pending between Grant Hotels Inc. and Host Marriott Corporation and others, which has prevented the discharge of the insolvency matter.

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98 *T.G. Holdings Limited and Grant Hotels Inc v Host Marriott L. and SLC Recovery Limited* SCS No 1566 of 2005 and SCS No 1675 of 2005, involving the same parties, concern the issue of the validity of an assignment made between a secured creditor Host Marriott and T.G. Holdings limited. The assignment purportedly acted to transfer Host Marriott’s security interests in a promissory note and debenture to T.G. Holdings Inc. in consideration of the compromised sum of one million United States of America dollars.
Bankruptcies

When dealing with a bankrupt debtor under the Barbados BIA the purpose of the legislation is clearly to protect the interests of creditors by ensuring that they can recover as much of the debts owed to them as possible in the circumstances while protecting them from debtor fraud. The Trustee’s main goal in bankruptcy proceedings, therefore, is to dispose of debtors’ estates for the benefit of the creditors. Pursuant to section 185 (3) of the Barbados BIA the Trustee is required to take possession of all of the property of the bankrupt. The Trustee takes possession of a debtor’s property in order to satisfy the claims of the creditors and section 187 of the Barbados BIA empowers the Trustee to take protective measures in the interest of preserving the debtor’s estate. These protective measures include carrying on the business of the bankrupt and disposing of property that is perishable or likely to depreciate rapidly. Trustees may also guard against the diminution of the bankrupt’s estate by causing the court to investigate whether a reviewable transaction has occurred subject to section 75 of the Barbados BIA. This section resembles section 96 (1) of the Canada BIA that concerns transfers at undervalue. The sections that address reviewable transactions safeguard the interests of creditors by ensuring that they will not be prejudiced by acts of fraud committed by debtors who seek to dispose of assets for less than their fair market value.

There are several isolated provisions throughout Part VI of the Barbados BIA that address the property of the bankrupt and promote creditor protection. For example, section 70 of the Barbados BIA relates to preferences and prohibits debtors generally from favouring specific creditors by granting them priority. Section 58 of the Barbados BIA offers another level of protection to certain creditors by enabling suppliers of goods to recover goods from a debtor. This is permissible in circumstances identical to those seen in section 81.1 of the Canada BIA where the debtor is bankrupt and the goods supplied are in the debtor’s possession, identifiable, in the same state as they were on delivery and have not been sold at arm’s length or are not subject to an agreement for sale at arm’s length.

Additionally, Part III of the Barbados BIA grants creditors in general the right to seek the appointment of an interim receiver and secured creditors the right to have a receiver appointed
pursuant to the terms of a security agreement.\textsuperscript{99} The provisions with respect to interim receivers are clearly designed to assist creditors. An interim receiver will only be appointed in two circumstances in accordance with \textit{section 9 (3) (a)} and \textit{(b)} of the Barbados BIA. An interim receiver will be appointed where such an appointment is necessary for the protection of the debtor’s estate, which is to be administered for the benefit of the creditors, or for the protection of the interests of one or more of the creditors. Likewise, the appointment of a receiver by a secured creditor will only occur where the appointing creditor is seeking to protect or recover the asset over which his security interest extends.

However, while the bankruptcy procedures are designed to protect the interests of creditors there are provisions within the bankruptcy regime that are clearly designed to facilitate the rehabilitation of debtors. One such provision is contained in \textit{section 134 (1)} of the Barbados BIA. \textit{Section 134 (1)} of the Act is based on \textit{section 157.1 (1)} of the Canada BIA and it provides that:

\begin{quote}
“The Trustee shall provide, or provide for, counselling for an individual bankrupt and his immediate family as prescribed, and the estate of the bankrupt shall pay the costs of the counselling, as costs of administration of the estate to the prescribed tariff.”
\end{quote}

Bankrupt individuals must, therefore, undergo mandatory counselling before being discharged from bankruptcy. No personal bankruptcy matters have been brought under the Barbados BIA since its inception. Thus the precise scope of the mandated counselling remains unknown and it also remains unclear as to whether the bankrupt individual would have to bear the cost associated with this counselling. It is fair to assume, however, that the Barbados legislature intended that Canada’s counselling scheme apply given that Barbados modelled its statutory regime after Canada’s model. The counselling services provided in Barbados would, therefore, likely involve credit counselling geared towards teaching the bankrupt individual about properly managing her money, obtaining and utilising credit, as well as determining the reason for her financial

\footnote{\textit{Barbados Bankruptcy and Insolvency Act, supra} \textit{note} 1 at s 7 – 10M.}
difficulties.\textsuperscript{100} The process of credit counselling in Canada has come under attack for not doing enough to promote financial education, as there is no evidence to illustrate that the counselling has been effective in this regard.\textsuperscript{101} Additionally, it is argued that the counselling sessions provided are too few and limited in their scope to provide debtors with any tangible advice concerning the management of their finances, and that the cost of the counselling only adds to the bankrupts’ debt.\textsuperscript{102} Therefore, if the Barbados legislature is truly desirous of rehabilitating debtors it will have to define the precise extent of the counselling required and institute counselling that fully educates debtors about credit management as a part of a broader educational program regarding the protections offered by the Barbados BIA. However, by at least requiring credit counselling within the Barbados BIA the Act ensures that there is a basis upon which debtors are required to attend counselling to achieve financial rehabilitation.

Additionally, while none of the bankruptcy and insolvency matters initiated pursuant to the Barbados BIA have been discharged, the discharge procedures in the Act were clearly designed to effect the speedy elimination of a debtor’s debts, providing her with the opportunity of making a fresh start free from debt. \textit{Section 146 (1)} of the Barbados BIA favours debtors by granting first time individual bankrupts an automatic discharge from bankruptcy similar to \textit{section 168.1 (1)} of the Canada BIA. Further, \textit{section 147} of the Barbados BIA provides that the making of an assignment into bankruptcy or a receiving order against or by anyone other than a corporation acts as an application for discharge. In order for an individual bankrupt to be discharged pursuant to an application for discharge under the Barbados BIA the Trustee must first prepare a report in accordance with \textit{section 148} of the Act. The Trustee must address a number of issues in his report. He must address the affairs of the bankrupt, the cause of his bankruptcy and the manner in which the bankrupt has performed the duties imposed on him under the Act. The Trustee must also address the conduct of the bankrupt both before and after the date of the initial bankruptcy event and whether the bankrupt has been convicted of any offence under the Barbados BIA. In accordance with \textit{section 149} of the Barbados BIA, the Trustee is required to make a

\begin{flushleft}
\textsuperscript{100} Duggan, \textit{supra} note 11 at 776. \\
\textsuperscript{101} \textit{Ibid} at 778. \\
\textsuperscript{102} \textit{Ibid}. 
\end{flushleft}
recommendation as to whether the bankrupt should be discharged from bankruptcy. On the hearing of the application for discharge the Court will then consider the recommendations of the Trustee along with any objections made by the Supervisor of Insolvency, the creditors or the debtor, before the debtor is granted a discharge. This procedure appears to largely remain the same for a bankrupt corporation, however, a bankrupt corporation must first satisfy the claims of its creditors in full before it applies for a discharge. The discharge provisions discussed above establish a clear system of discharge. The discharge process favours debtors by ensuring that they can be discharged from bankruptcy in a quick and identifiable manner. This brings certainty to the system of discharge. The process of discharge outlined above is not only efficient but it also assists in the rehabilitation of debtors by once again eliminating their debts and enabling them to have a fresh start at financial viability.

The legislative provisions mentioned above are clear in their intent. They can easily be identified as assisting either creditors or bankrupt debtors. However, section 29 (1) may be one of the provisions that is most helpful to bankrupt debtors even though it fails to illustrate such a purpose on its face. Section 29 (1) of the Barbados BIA provides that:

“The approval by the Court of a proposal made after bankruptcy operates to annul the bankruptcy and to revest in the debtor, or in such other person as the Court may approve, all the right title and interest of the trustee in the property of the debtor, unless the terms of the proposal otherwise provide.”

Section 29 (1), therefore, also facilitates the Debtor-In-Possession scheme. Therefore, where the creditors and the court approve a proposal made by the debtor after bankruptcy, the debtor may continue to manage his affairs or the affairs of a bankrupt company for the benefit of his creditors. The debtor can thus take steps to ensure the success of the business while paying his company’s debts. An independent receiver or Trustee may not have the requisite skill or peculiar knowledge necessary to conduct the bankrupt company’s business, whereas, the directors and managers of the company might. Permitting the debtor to remain in possession of a bankrupt company, helps rehabilitate the debtor by providing the debtor with the opportunity to learn from its mistakes, reorganize the company and satisfy its debts without being displaced by a Trustee or Receiver.
3.3 The Economic Policy Considerations Within the Barbados BIA

The legislature also designed the Barbados BIA to further the economic policy consideration of encouraging the development of new businesses and promoting greater risk taking in business. The Barbados BIA, however, was clearly not drafted to offer any funding or tax incentives to businesses that are starting-up or experiencing financial difficulties. The legislative provisions within the Barbados BIA encourage the formation of new businesses and risk taking in the same manner that the Act furthers the political policy considerations mentioned above.

The provisions of the Barbados BIA rehabilitate debtors through the proposal process and the appointment of the Trustee discussed above. Additionally, the Barbados BIA protects debtors through the appointment of the Supervisor of Insolvency who is responsible for the administration of the Barbados BIA and ensuring the integrity of the bankruptcy process. These provisions assist in the rehabilitation of debtors but they also act as an incentive for the creation of new businesses. It is reasonable to assume that where the legislation facilitates the efficient financial recovery of debtors, that debtors may be more inclined to start businesses or take greater risks, as they are assured that the Barbados BIA would protect them from complete financial ruin.

Likewise, the provisions that serve to protect creditors from fraud are also likely to persuade creditors to engage in economic growth by investing in new and existing companies. The security provided to creditors under the terms of the Barbados BIA including the appointment of a Trustee, the ability to appoint receivers and interim receivers play a role in encouraging creditors to extend credit to individuals and businesses. Additionally, the protection from fraudulent transactions and preferences and the ability of suppliers to recover goods may also encourage creditors to stimulate economic growth by investing in businesses. The provisions of the Barbados BIA, therefore, encourage creditor investment in businesses as they serve to protect creditors’ interests and mitigate any loss that they might suffer.

It is also important to note that the Barbados BIA offers protection to creditors who may have initiated foreign proceedings against a debtor who has property in Barbados. Part XI of the

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103 Barbados Bankruptcy and Insolvency Act, supra note 1 at s 161.
Barbados BIA concerns International Insolvencies and essentially provides for the protection of foreign creditors’ interests. Part XI accomplishes this through the recognition of insolvency or bankruptcy claims which originate outside of Barbados against a debtor who has assets located within this jurisdiction. Ultimately, if foreign creditors remain comfortable that they can recover the debts owed to them, they may be more willing to invest in Barbadian businesses and thus stimulate further economic growth.

Between January 2001 and May 2013, 10,304 domestic companies and 5,007 international business companies were incorporated in Barbados.\textsuperscript{104} I cannot quantify how many of these companies were incorporated because of the protections granted to debtors and creditors, neither can I assess whether the provisions of the Barbados BIA even influenced the decisions to establish these businesses. However, the provisions of the Barbados BIA clearly offer an incentive to create and invest in new and existing businesses by providing both debtors and creditors with greater protection than what was experienced under the Barbados BA.

### 3.4 The Social Policy Considerations Within the Barbados BIA

The Barbados BIA was also enacted to help change the bankruptcy culture in Barbados. The legislature hoped that the provisions of the Barbados BIA would help remove the stigma that attaches to bankrupts. The history of bankruptcy law in Barbados reveals that members of the Barbadian public view bankruptcy as a shameful state to be avoided at all costs. This is not only revealed in the Senate debates discussed above but also by the fact that no personal bankruptcies were initiated under the old Barbados BA.

While the Barbados BIA clearly has provisions directed towards rehabilitating debtors, protecting creditors from fraud, promoting the creation of new business and risk taking it is harder to identify provisions specifically designed towards removing the stigma of bankruptcy. \textit{Section 146 (1)} of the Barbados BIA, mentioned above, may be viewed as a provision that attempts to remove the stigma of bankruptcy. This section makes it easier for bankrupts to be

\textsuperscript{104} Incorporation Statistics provided by Ms. Eleanor Howard, Deputy Registrar, Corporate Affairs and Intellectual Property Office.
discharged from bankruptcy and may thus have some effect on removing the stigma of bankruptcy. *Section 147* of the Barbados BIA provides that receiving orders or assignments into bankruptcy made in relation to an individual bankrupt act as applications for discharge. An individual bankrupt may, therefore, receive an automatic discharge from bankruptcy after the expiration of 9 months from the date of filing provided that all of the conditions in *section 146 (1)* of the Barbados BIA are met. Under the provisions of *section 147 (4)* of the Barbados BIA a bankrupt company can also receive a discharge from bankruptcy provided that all of its creditors have been satisfied in full. These provisions ensure that a bankrupt individual or company can be quickly discharged from bankruptcy without engaging the courts and proceeding through a long and public hearing. This efficient system of discharge avoids the publicity that attaches to most hearings in Barbados and limits the public exposure of debtors and as such can be seen as a measure that contributes towards removing or at least reducing the negative attention and stigma that is associated with bankruptcy proceedings. Avoiding the negative publicity that attaches to bankrupts may be a positive factor that helps to eliminate the stigma that attaches to bankrupt individuals. However, it is a reality of modern day business that businesses may fail despite the best efforts of its owners, directors or managers. Therefore, I believe that the Barbados BIA had far less of a role to play in removing the stigma of bankruptcy as it relates to corporations.

Thus far no personal bankruptcy matters have been brought under the Barbados BIA despite the negative effects of the global economic crisis of 2008, which has significantly impacted many individuals in Barbados. It is unclear, however, whether this is because the legislation has not done enough to remove the stigma of bankruptcy in Barbados or whether this is due to the costs associated with bankruptcy and insolvency proceedings in Barbados, an issue that shall be discussed in the following chapter.

### 3.5 Concluding Remarks

The provisions of the Barbados BIA do attempt to take steps to address the social policy consideration of removing the stigma of bankruptcy. However, it is difficult to gauge the whether the stigma associated with Bankruptcy in Barbados has been removed as only one company in
Barbados has made an assignment into bankruptcy\textsuperscript{105} and no individuals have relied on the mechanisms provided under the Barbados BIA.

The provisions of the Barbados BIA establish a solid framework that supports the political and economic goals pursued by the legislature. In this regard the bankruptcy and insolvency laws of Barbados definitely fulfill the policy considerations underlying the Act. The provisions of the Act support the rehabilitation of debtors, the protection of creditors and the creation of businesses and risk taking in business. Despite this, however, none of the five matters brought before the Court pursuant to the Barbados BIA have been completed, leading to the inescapable conclusion that the bankruptcy and insolvency regime in Barbados is not functioning efficiently. In Chapter Four I shall examine what factors have lead to this state of affairs.

\textsuperscript{105} In the Matter of the Bankruptcy and Insolvency Act Chapter 303 of the Laws of Barbados and in the Matter of the Bankruptcy of Captain Haddock & Company Limited, SCS No 2 of 2008.
CHAPTER FOUR

4. The System Of Bankruptcy And Insolvency Law In Barbados Is Not Working Efficiently

4.1 Introduction

Despite having the necessary legislative infrastructure in the form of the Barbados BIA, the bankruptcy and insolvency regime in Barbados is not working efficiently. Since the implementation of the Barbados BIA five matters have been initiated before the Courts. However, none of these matters have been resolved and thus, all of the companies involved in these applications remain in a state of bankruptcy or insolvency.

There are a number of factors that play a role in preventing the bankruptcy and insolvency regime in Barbados from operating in an efficient manner. These factors can largely be classified into either one of two categories. The first category that I shall address in this chapter is the category concerning the “deficiencies within the legislation”. While the Barbados BIA represents a progressive approach towards insolvency legislation and reform, the law in Barbados fails to include any rules or regulations that govern the precise manner within which the Act is to be administered. This leads to practical difficulties in conducting bankruptcy and insolvency matters in Barbados.

The second category of issues that prevents the efficient administration of bankruptcy and insolvency law in Barbados is the category of “external factors”. The classification of external factors is used to describe a number of issues beyond the scope of the legislation, which hinder the application of the law. These factors are varied and include the lack of trustees and sitting judges trained in managing and adjudicating bankruptcy and insolvency matters. In this chapter I shall fully explore both the deficiencies within the legislation and the external factors that hinder the effectiveness of the Barbados BIA.
4.2 Deficiencies Within the Legislation

The principal deficiency within the bankruptcy and insolvency legislative framework in Barbados is the lack of any rules or regulations. In Barbados subsidiary legislation in the form of rules and regulations is generally enacted at the same time or soon after the passing of the primary legislation. While Acts such as the Barbados BIA codify the law, rules are equally as important as they establish the methods of procedure to be adopted in administering the provisions of the Act.

The Canada BIA has a set of accompanying rules in the form of the Bankruptcy and Insolvency Rules (Canada BIA Rules).\(^{106}\) The Canada BIA Rules make a number of provisions that permit bankruptcy and insolvency matters to proceed with a uniformed efficiency. The Canada BIA Rules set rules, which have the force of law, for a number of matters including the initiation of court proceedings,\(^{107}\) the examination of witnesses,\(^{108}\) and the execution of search, seizure and arrest warrants.\(^{109}\) However, the provisions regarding the Trustee in the Canada BIA Rules may be the most significant provisions of the Rules. The Canada BIA Rules establish a code of ethics for Trustees. This code of ethics requires Trustees to “maintain the high standards of ethics that are central to the maintenance of public trust and confidence in the Act.”\(^{110}\) Section 36 of the Canada BIA Rules further provides that Trustees must act with competence, honesty, integrity and due care in discharging their duties. Additionally, section 39 of the Canada BIA Rules requires Trustees to be honest, impartial and to provide the interested parties with full and accurate information with respect to the professional engagements of the Trustee. The Canada BIA Rules further state the duties of Trustees from sections 55 to 57 of the Rules and also address the Trustee specifically in legislating for when a Trustee’s Report must be prepared.\(^{111}\)

\(^{106}\) Bankruptcy and Insolvency Rules, CRC 1978, c. 368.

\(^{107}\) Ibid at s 9.

\(^{108}\) Ibid at s 14.

\(^{109}\) Ibid at s 15 – 17.

\(^{110}\) Ibid at s 34.

\(^{111}\) Ibid at s 121.1.
The Canada BIA Rules place great emphasis on regulating the activities of Trustees due to the essential role that they play in facilitating the efficient working of the Canada BIA. The Barbados BIA likewise appears to recognise the importance of the role of Trustees and makes certain provisions concerning their role. Section 185 (1) of the Barbados BIA requires Trustees to give security, in cash or bond, to the Supervisor of Insolvency for all the property received once appointed. Sections 185 (3) and 187 of the Barbados BIA, discussed at page 38 above, require Trustees to take possession of the bankrupt’s property and permit Trustees to take protective measures in the interests of the bankrupt’s estate. Trustees are also required to maintain proper books and records under the Barbados BIA, as well as report to the Supervisor of Insolvency, the Inspectors or specific creditors regarding the condition of the bankrupt’s estate when requested. However, the Barbados BIA lacks any rules that identify Trustees’ ethical responsibilities. The Barbados BIA merely includes a section 170, which provides that “A trustee shall comply with such code of ethics respecting the conduct of trustees as may be prescribed”. This provision grants little guidance to Trustees, creditors, debtors or the court and merely anticipates that a substantive code of ethics may be drafted. To date, however, no such code of ethics exists.

The absence of a code of ethics governing the conduct of Trustees has already had a negative impact in at least one matter in Barbados and may prove to present a continuing concern in the future. The case of Host Marriott L.P. and SLC Recovery Ltd v. John Richard A. Lynch is further litigation arising out of the insolvency matter involving Grant Hotels Inc. In the case of Host Marriott L.P. and SLC Recovery Ltd v. John Richard A. Lynch, Host Marriott initiated a civil suit against Mr. Lynch, the trustee in bankruptcy of Grant Hotels Inc., claiming that he was negligent and breached the standard of care required of an insolvency trustee and violated various provisions of the Barbados BIA. The claims for negligence and breach of standard of care

112 Ibid at s 195.
113 Ibid at s 197.
result from the trustee’s alleged failure to disclose material information to Host Marriott a secured creditor. Further, Host Marriott claims that the trustee breached his duties by failing to provide it with a copy of the Further Amended Creditors’ Proposal, and voting on the proposal as Host Marriott’s proxy when he had no authority to do so. The claimant, Host Marriot, further claims that the Trustee made a number of misrepresentations in the Proposals. The trustee filed a defence in this matter denying the claims of the claimant and further arguing that the claimant’s claim was statute barred in any event.\textsuperscript{116} The trustee further filed an Application to Strike Out Host Marriott’s Claim.\textsuperscript{117} This Application was grounded in section 253 of the Barbados BIA that provides that an action may not be brought against a trustee unless leave of the court is first granted.

While this application has been heard before the court, a decision has not yet been rendered and, therefore, the outcome of this application and the substantive claim remains uncertain. However, it cannot be disputed that the existence of rules or regulations governing the conduct of trustees would make the determination of these issues much simpler. There are no rules requiring trustees in Barbados to act honestly, impartially, with competence and integrity or to provide all parties with full and accurate information. The claimant, and indeed future creditors, may thus face an impossible task in proving that the defendant breached the statutory duty of care owed by trustees as no such duty is articulated within the Barbados BIA.

The lack of rules does not only negatively impact the claimant in this case but it also poses problems for potential trustees and the administration of bankruptcies and insolvencies as a whole. Without rules trustees receive no legislative guidance as to how they must conduct themselves during insolvency proceedings. This not only hinders their ability to efficiently carry out their duties but also opens trustees to increased scrutiny and the threat of law suits as seen in the \textit{Host Marriott L.P. and SLC Recovery Ltd v. John Richard A. Lynch} case.


The lack of rules also had a negative impact on the administration of the bankruptcy practice in Barbados in the *Matter of the Bankruptcy of Captain Haddock & Co. Ltd.*\(^{118}\) As mentioned above, section 185(1) of the Barbados BIA requires Trustees to give security for all of the property received by him as trustee and for the faithful performance of his duties. Section 185 (2) provides that:

“The security required to be given under subsection (1) shall be deposited with the Supervisor, shall be given in favour of the creditors generally and may be enforced by any succeeding trustee or by one of the creditors on behalf of all by direction of the Court, and may be increased or reduced by the supervisor.”

However, there was confusion in the *Captain Haddock* matter regarding the nature or form that the security had to take. In order to resolve this issue Mr. Marcus Wide a chartered accountant and chartered insolvency and restructuring practitioner with PricewaterhouseCoopers LLP in Halifax, Nova Scotia, filed an affidavit to assist the applicant and the court.\(^{119}\) Mr. Wide noted that section 16(1) of the Canada BIA similarly required trustees within Canada to provide security after being appointed as trustees.\(^{120}\) Mr. Wide further noted at paragraph 5 of his Affidavit that despite the statutory provision mentioned above that a practice had emerged in Canada whereby the Official Receiver sets the amount of the security at “nil”. Setting the security at nil obviates the need for the trustee to obtain a bond or cash security for deposit, which historically has proven to be a very difficult task.\(^{121}\) The rules that accompany any Act of parliament should address matters associated with the administration of the Act. Issues related to the efficient practice of the bankruptcy and insolvency regime should be addressed within the rules. This would ensure that the judges hearing applications made pursuant to the rules would have a clear basis upon which to make their decisions and would limit instances of judicial law-

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making. Since the enactment of the Canada BIA in 1992 a practice of not insisting upon a bond has developed in Atlantic Canada. In practice it would appear to be wise not to insist upon the trustee’s procurement of a bond equal to his potential liabilities. Due to the level of uncertainty regarding the trustee’s functions and his potential exposure financial institutions are likewise not expected to provide the trustee with sufficient cash or bonds in accordance with the provisions of the Barbados BIA. While this practice is not codified within the Canada BIA Rules, there is no reason why a definitive position concerning the level of security, if any, required in practice should not be represented in Rules accompanying the Barbados BIA. In only recently reforming its bankruptcy and insolvency regime Barbados has had the privilege of examining the Canadian model and the Barbados legislature should take heed of the developments that have taken place in Canada in drafting a complete set of Rules that addresses issues that have arisen in practice that are not currently covered by the Barbados BIA. This would ensure greater efficiency in our system of bankruptcy practice.

The rules that accompany Acts in Barbados usually contain the precedents and forms that are to be relied on by the parties filing applications pursuant to the Act. However, since no rules have ever been enacted with respect to the Barbados BIA there is no easily accessible compendium of forms available to parties desirous of initiating or opposing an application. While copies of all necessary forms can be obtained from the Supervisor of Insurance, an efficient system of insolvency practice should ensure that all of the requisite forms are at least readily available in one piece of legislation or set of rules that is readily available to all bankruptcy practitioners and the public at large.

Additionally, since no forms have been approved by the legislators for use within the bankruptcy and insolvency practice in Barbados, the forms currently circulated for use by the Supervisor of Insolvency are borrowed from other jurisdictions. In theory, this may not be a significant cause for concern since Barbados’ entire legislative scheme of bankruptcy and insolvency law is borrowed from Canada, however, this leads to certain absurdities in practice. Form 93, Application For Trustee License (Individual) must be submitted to, and approved by the Supervisor of Insolvency before a Trustee can be licensed to practice under the Barbados BIA.  

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122 Form 93, Application For Trustee License (Individual) is included at Appendix A.
This form requires that the applicant submit information regarding her qualifications and also compels the applicant to certify that she has successfully completed the BIA Insolvency Counsellor’s Qualification Course and the National Insolvency Qualification Program.\textsuperscript{123} Unfortunately, however, neither of these courses or programs actually exists. The programs mentioned above have never been instituted in Barbados and the prerequisite requiring completion of these programs appears to be the result of a wholesale copying of forms relating to other jurisdictions. Alternatively, the legislature may have intended to establish both a counsellor’s qualification Course and an Insolvency Qualification program, but ultimately failed to do so. Irrespective of the reasons for including these provisions the fact remains that neither program exists. In order to be qualified to act as a Trustee under the Barbados BIA, the prospective Trustee must only satisfy the Supervisor of Insolvency that her qualifications, prior work experience, or knowledge within the field of bankruptcy and insolvency justify accreditation. Form 93, therefore, causes confusion in practice by making reference to unnecessary qualifications.

Further, Form 93 also requires prospective Trustees to provide the Supervisor of Insolvency with a cheque in the amount of $1,700.00 on applying for approval to be licensed as a Trustee.\textsuperscript{124} In practice this fee is not actually required to be paid by the prospective Trustee upon application. The payment of fees required in order to be certified under a particular statutory provision are generally incorporated under the Rules enacted in relation to the substantive legislation. However, as mentioned throughout this chapter there are no rules accompanying the Barbados BIA mandating the fees to be paid or any other provisions. Therefore, persons applying to be licensed as Trustees under the Barbados BIA currently pay the sum of $15.00 per document accompanying their application as the relevant administrative fee. A similar fee of $15.00 is also attached to the filing of all applications made by the Trustee or on behalf of any of the parties to a matter under the Barbados BIA including individual and corporate debtors. This fee is based on the practice in Barbados whereby matters initiated pursuant to the High Court of Judicatures

\textsuperscript{123} *Ibid* at 2.
\textsuperscript{124} *Ibid* at 5.
Civil Jurisdiction require a filing fee of $15.00 be paid to the Supreme Court Registry of Barbados upon filing.

### 4.3 External Factors

One of the external factors that prohibits the efficient resolution of bankruptcy and insolvency matters in Barbados affects the administration of justice in Barbados as a whole. This factor is the unavailability of judges who can quickly hear and determine matters brought before the court. The system of bankruptcy and insolvency law instituted by the Barbados BIA is one that is designed to make limited reference to the courts. However, applications made pursuant to the Barbados BIA are made before a judge sitting in the High Court of Judicature, Civil Division, and the Barbados experience with bankruptcy and insolvency law, as will be discussed below, indicates that the courts attention is often engaged to resolve issues arising under the Act.

In the year of 2012, 2273 claims were filed before the High Court of Judicature’s Civil Division, additionally 625 new matters were filed before the High Court’s Family Division.\(^{125}\) When new claims are filed in the Supreme Court Registry a date of hearing that is usually 2 to 3 months from the date of filing, unless the matter is filed under a certificate of urgency, is granted. With the constant stream of new matters being filed before the court in addition to the claims already being heard, the administration of justice in Barbados is effected very slowly. It takes months to have a preliminary matter heard before the court and matters often remain part-heard for years. Further, once the substantive hearing is completed judges often take inordinately long periods of time to return decisions, presumably because of their heavy workloads. The final appellate court for Barbados, the Caribbean Court of Justice (CCJ), criticized the administration of justice in Barbados in the case of *Sea Havens Inc. v. John Dyrud*.\(^{126}\) In the judgment of the court delivered by the Honourable Mr. Justice Hayton on the 3\(^{rd}\) day of November 2011, the court noted in its obiter dicta that:

\(^{125}\) Filing Statistics provided by Ms. Veronica Greenidge, Legal Assistant, of the Supreme Court Registry of Barbados.

“There was, however, a longer delay of four years eight months from 6 June 2002 to 7 February 2007 before the Appellant’s case was heard. So far as counsel before us were aware, the delay was due to the civil justice system not to any negotiations between the parties leading to their delaying matters. This is a most unsatisfactory situation that needs to be remedied and we trust that the new Civil Procedure Rules will considerably improve matters. The expeditious resolution of commercial disputes yields a net benefit not just to the litigants but also to the economy of Barbados…”

The criticism in the Sea Havens Inc. case was levelled against the judiciary following the CCJ’s decision in the case of Yolande Reid v. Jerome Leon Reid. In the Yolande Reid case the court held that High Court judges should return decisions generally within three months or six months when the subject matter of the claim is complex. Despite the introduction of the new Civil Procedure Rules in 2009 and the decisions delivered by the CCJ the administration of justice in Barbados has not improved. Even the most basic of matters remain before the court for several years unless settled by legal counsel. Therefore, bankruptcy and insolvency matters that generally engage the interests of numerous creditors and are concerned with recent legislation and points of law that the judges may be unfamiliar with also remain before the court for extended periods of time without being settled. In fact none of the matters brought before the court under the jurisdiction created by the Barbados BIA, as mentioned above, have been resolved or discharged.

Apart from the caseload that impedes the efficient administration of justice in Barbados the lack of judicial expertise in the area of bankruptcy and insolvency law may also inhibit the speedy resolution of bankruptcy and insolvency matters. For example, the Grant Hotels Inc. insolvency commenced by way of a proposal in 2003 and the Captain Haddock bankruptcy commenced by way of assignment in 2008 have yet to be discharged. The lack of rules to guide judges in the management of bankruptcy and insolvency claims coupled with their lack of theoretical or

127 Ibid at 7.
129 Ibid at para 22
practical experience in handling such matters surely contributes to the delays experienced in resolving matters under the Barbados BIA.

Additionally, the Trustee in bankruptcy and insolvency proceedings is an officer of the court and is required to act in the interests of both the debtor and creditors and facilitate the efficient resolution of the proceedings. The Trustees role is, therefore, essential to the effective administration of applications made pursuant to the Barbados BIA. Despite the importance of their role, however, Trustees in Barbados are not provided with any formal training educating them as to their numerous duties under the Barbados BIA or instructing them in how to carry out their duties. There are currently 11 Trustees licensed by the Supervisor of Insolvency subject to the provisions of the Barbados BIA. These trustees include; Christopher Sambrano, Craig Waterman, Brian Robinson, Grenville Phillips, Ilkins Clarke, Oliver Jordan, Patrick Toppin, David Holukoff, Zack Nadur, William Hutchinson and Lisa Toppin. John Richard Lynch was appointed to act as Trustee in the *Grant Hotels Inc.* matter by the debtor and creditors and had his appointment approved by the court.

Grenville Phillips is the most experienced of the Trustees licensed in Barbados. Dr. Phillips consulted on the initial drafting of the Barbados BIA and currently acts as a Trustee in three matters before the court.¹³⁰ Craig Waterman and Christopher Sambrano of PricewaterhouseCoopers EC Inc. have extensive experience acting as managers and receiver-managers of distressed businesses in Barbados. Additionally, David Holukoff of KPMG and Oliver Jordan of Deloitte Barbados act as judicial managers pursuant to section 57(1) of the Insurance Act for the insolvent insurance companies British American Insurance Company and CLICO International Life Insurance Limited, respectively. All of the Trustees named above are chartered accountants and no doubt have experience in matters regarding accounting and corporate affairs, however, Trustees under the Barbados BIA have a specialized role that goes beyond the role of receivers or managers under the Companies Act or the Insurance Act. Trustees must thus be educated as to the duties that they are responsible for carrying out under the terms of the Barbados BIA. Trustees’ duties broadly include investigating the cause of the

¹³⁰ Dr. Phillips acts as Trustee in the following matters *In the Matter of Ideal Agencies Ltd*, SCS No 0486 of 2010, *In the Matter of Trimart Incorporated*, CV No 1192 of 2010 and *Airone Ventures Limited*, SCS No 929 of 2012.
debtor’s insolvency, providing the debtor with advice and counselling, gathering and selling the debtor’s assets and making a distribution. In order to successfully carry out these functions Trustees must have some measure of formal training directing them as to how to discharge their duties in accordance with the provisions of the Barbados BIA. At the very least, Trustees should be required to pass an examination indicating their familiarity with the responsibilities of Trustees under the Barbados BIA. The wisdom of this approach is recognized in Canada where Trustees are required to pass a qualifying examination before they are eligible to be licensed as Trustees.\textsuperscript{131}

In Barbados the bankruptcy and insolvency regime is thus hindered by a lack of experience on the part of the judges who have oversight of bankruptcy and insolvency matters as well as trustees who lack formal training in administering insolvent estates. The development of the bankruptcy and insolvency system in Barbados is also impeded by the lack of claims being brought before the court under the jurisdiction of the Barbados BIA. Perhaps the problems noted above contribute to a reluctance to bring matters under the Barbados BIA, however, the jurisprudence in this area can only develop if the judiciary and all of the relevant stakeholders utilise the mechanisms established in the Barbados BIA.

In Canada 48,362 proposals were made under the Canada BIA in 2012,\textsuperscript{132} whereas in Barbados only one proposal was made pursuant to the provisions of the Barbados BIA for the corresponding period.\textsuperscript{133} It may be unfair to compare the number of proposals and assignments brought in these jurisdictions due the vast difference in the size and population of the countries. However, even in Jamaica, 8 petitions were brought under the Jamaica BA and 3 were brought under the Jamaica Companies Act in relation to insolvent debtors and companies in 2012. This indicates that Barbadian individuals and companies are reluctant to utilise the assistance provided to insolvent and bankrupt debtors under the Barbados BIA. Neither debtors nor

\begin{itemize}
\item \textsuperscript{131} \textit{Duggan, supra} note 11 at 89.
\item \textsuperscript{133} \textit{In the Matter of the Bankruptcy and Insolvency Act Chapter 303 of the Laws of Barbados and in the Matter of the Bankruptcy of Captain Haddock & Company Limited}, SCS No 2 of 2008.
\end{itemize}
creditors appear to be relying on the provisions of the Barbados BIA to any great extent. Rather it is much more commonplace for creditors to appoint receivers to manage the business of a failing corporate debtor where their security interest permits them to do so. With respect to individual debtors the common practice in the courts of Barbados is to bring a civil claim for damages for breach of contract against a debtor who has defaulted in making credit card payments or generally satisfying any debt due to the creditor. This often results in several separate actions being initiated against the debtor by numerous lending institutions. These types of claims often lead to long drawn out hearings and even when debtors do not defend the claims brought against them, the recovery of the debts is generally a slow process supervised by the courts on a case-by-case basis. Debtors often default on payment arrangements made to satisfy the debts owed and further enforcement proceedings are typically initiated against debtors to recover the debts including garnishing wages and other more onerous measures. Despite this however, Barbadians remain reluctant to rely on the provisions of the Barbados BIA. The reluctance of Barbadians to make proposals or assignments under the Barbados BIA may be influenced by the factors mentioned above including the lack of confidence in the judges and trustees who administer the bankruptcy and insolvency system or simply an ignorance of the protections that the Barbados BIA offers. The hesitance to rely on the remedial provisions of the Barbados BIA may also be due to the uncertainty surrounding the fees that debtors are required to pay before being discharged from bankruptcy.

As mentioned above the filing fee attached to matters under the Barbados BIA is $15.00. Section 123 of the Barbados BIA further requires that the Trustee pay a levy of 5% on all payments made on account of the creditors to the Supervisor of Insolvency. While these fees appear affordable, there is still great uncertainty regarding the quantum of trustee and counselling fees that a debtor may have to pay as they are not regulated by legislation or practice. In the *Grant Hotels* matter where the debts owed by the company totalled $41,367,709 on filing provisions for fees were made in the amount of $1,777,335.\textsuperscript{134} There is no evidence in the proposal, the subsequent further amended proposal or the Trustee’s report on the proposal indicating how this fee was calculated.

In the *Airone* matter, where the debts owed by the Debtor were similar in quantum to those of *Grant Hotels Inc.*, the Trustee made the following provisions for Trustee’s fees:

“‘Trustee Fees’ and/or ‘Trustee Emoluments’ mean the fees of the Trustee and include emoluments paid to his servants, agents and staff which in the aggregate is recovered from the funds to be deposited under the Proposal with the Trustee for creditors in accordance with the following formula: A basic retainer of $50,000 plus a fee at the rate of 8.75% pro-rated and recoverable from amounts payable to each person of all categories of creditors covered by the Proposal (limited however to a maximum of $600,000 unless otherwise approved by the Creditors other Court) plus VAT thereon at the applicable rate in each case.”

On the date of filing the claims outstanding against the debtor totalled $47,147,003. While the fees charged and anticipated by the Trustee in the *Airone* matter are significantly less than those charged in the *Grant Hotels Inc.* matter, both sums appear to be quite high and rather onerous payments for an insolvent debtor to have to satisfy. Further, there appears to be no consistency in the manner in which fees are charged between the Trustees. One trustee is charging in excess of $1,000,000 and another charging a maximum of $600,000 unless the creditors and the court sanction a higher sum. The high fees attached to Trustees services and the uncertainty as to how such sums will be calculated in the absence of regulations concerning fees, therefore, may likely be another factor which discourages debtors from proceeding through the bankruptcy and insolvency regime established under the Barbados BIA.

The Trustees fees mentioned above were all charged in relation to corporate debtors. Thus far, no individuals have made applications pursuant to the Barbados BIA and, therefore, we do not know whether Trustees would be inclined to charge similarly high fees in relation to individual debtors. However, it is reasonable to assume that individual debtors may be reluctant to make an assignment or proposal under the Barbados BIA because of the apparent expense of high Trustee fees that applies for corporate debtors.

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4.4 Concluding Remarks

An examination of the bankruptcy and Insolvency legislative framework in Barbados reveals that the statutory basis is flawed. While the primary legislation, the Barbados BIA, is sound the lack of subsidiary legislation in the form of Rules prevents the bankruptcy and insolvency system in Barbados from operating efficiently. In the absence of rules there is a clear lack of regulations concerning the manner in which Trustees much discharge their duties. Since there are no rules mandating that Trustees pass qualification examinations in order to become eligible to be licensed as Trustees licensing appears to be completed on a purely discretionary basis by the Supervisor of Insolvency. Licensing may thus be granted on a rather arbitrary basis with regard to a Trustee’s professional experience as a chartered account but with little regard as to whether they are capable of fulfilling the duties of a Trustee under the Barbados BIA. Further, the court suffers from a lack of rules as it is left to regulate procedure on an ad hoc basis. These factors, which I have labeled as “deficiencies within the legislation” are further compounded by the “external factors” that cumulatively ensure that the bankruptcy and insolvency system cannot function as the legislature intended. Barbados lacks the resources to efficiently hear the bankruptcy matters coming before the court. Barbados lacks the sufficient number of judges required to hear the matters coming before the court and this leads to significant delays that prohibit the quick disposition of bankruptcy matters and all legal matters general.

Additionally, there is a lack of judicial personnel and trustees trained in bankruptcy and insolvency practice Barbados. Bankruptcy and insolvency practice is a distinct and technical discipline within the law that requires specialised training and expertise if it is to function efficiently, and the lack of understanding of bankruptcy procedure has certainly negatively impacted the practice in Barbados.

Ultimately it appears as though the Barbadian public is reluctant to make proposals or assignments under the Barbados BIA. This may be the result of a number of factors. Individual debtors may still view bankruptcy with shame and thus avoid relying on the protections granted under the Barbados BIA. The public may also view the bankruptcy and insolvency system as being inefficient and untrustworthy. Alternatively the high costs associated with undertaking bankruptcy and insolvency proceedings under the Barbados BIA may be the significant factor
that deters Barbadians from utilising the Barbados BIA. Irrespective of the reasons for not employing the provisions of the Barbados BIA, the failure to commence matters under the Act negatively impacts the administration of bankruptcies and insolvencies in Barbados as it ensures that the jurisprudence in this area of practice cannot develop. In my final chapter, Conclusion and Recommendations, I shall discuss the ways in which the bankruptcy and insolvency system in Barbados can be improved so that it functions efficiently.
Conclusion And Recommendations

In order to fix the problems inherent in the bankruptcy and insolvent regime in Barbados, Rules regarding the practice of bankruptcy and insolvency law must first be enacted. Cogent Rules detailing the precise manner within which bankruptcy and insolvency law must be practiced will greatly ameliorate or completely remove many of the problems currently experienced in administering matters pursuant to the Barbados BIA. I shall now discuss the provisions that I believe must be included in the Rules to ensure that they assist in the effective resolution of matters under the Barbados BIA.

Rules Regarding Trustees

The Trustee is a major player in the bankruptcy and insolvency regime of Barbados and Canada. The Barbados BIA, however, does not ensure that the Trustee is equipped with the requisite level of skill or knowledge required to sufficiently safeguard the interests of debtors and creditors and effect the efficient resolution of bankruptcy and insolvency matters. The Rules must first go beyond the provisions of the Barbados BIA which merely state that the “…trustee shall comply with such code of ethics respecting the conduct of trustees as may be prescribed.” The Barbados BIA fails to identify any code of ethics and the Rules must, therefore, establish a substantive code of ethics that Trustees must abide by in administering insolvent estates. The Barbadian code of ethics may be based on the provisions of sections 34 – 53 of the Canada BIA Rules. While the Rules in Barbados need not copy the Canada BIA Rules’ code of ethics verbatim it should include provisions requiring the Trustee to act professionally, honestly, in good faith and with competence and integrity in discharging her duties. Ensuring that Trustees are held to a high standard of conduct would improve the administration of bankruptcies and insolvencies as a whole and enhance public confidence in the bankruptcy and insolvency regime as well.

136 Barbados Bankruptcy and Insolvency Act, supra note 1 at s 34.
The Rules also need to specifically mandate the minimum requirements that a person must satisfy before being capable of consideration as a Trustee. Compelling prospective Trustees to pass an examination regarding the duties of Trustees prior to their appointment would ensure that they are aware of the functions of their post. Trustees would, therefore, have the knowledge necessary to conduct bankruptcies and insolvencies and be in a better position to achieve the efficient resolution of matters.

Rules in Barbados have the force of law and as such the Rules should require Trustees to pass a qualification examination. However, the process of setting the examinations and facilitating the continuing education of Trustees may best be left to a private professional organization. In Canada the Canadian Association of Insolvency and Restructuring Partners (CAIRP) plays an important role in educating Trustees about their duties. The CAIRP in conjunction with the Supervisor of Insolvency administers a qualification program that prepares persons to be licensed as Trustees by the Supervisor of Insolvency. The CAIRP also lobbies and advocates on behalf of its members. If the bankruptcy and insolvency practice in Barbados is to develop a professional organization such as the CAIRP must be established as soon as possible. A professional organization for Trustees can assist in educating and training Trustees and prospective Trustees and provide a forum for Trustees to discuss the issues affecting the administration of bankruptcies and insolvencies in Barbados.

Additionally, there is a need for a private or public body that can assist the public in securing the services of a Trustee or provide members of the public with advice regarding the bankruptcy and insolvency processes, as the Office of the Supervisor of Insolvency does not appear to offer these services as part of its mandate. A check of the Barbados Yellow Pages reveals no mention of or listings for Trustees in bankruptcies. Members of the public, therefore, are often left with no other recourse than to seek the counsel of a private legal practitioner in order to get even the most basic of information concerning the bankruptcy and insolvency regime. Establishing a body designed to offer advice to members of the public would assist in educating the public as to the

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137 Canadian Association of Insolvency and Restructuring Partners, Becoming a Member online: CAIRP <http://www.cairp.ca/membership/becoming-a-member/general/index.php>.
role of the Trustee, help them find trustee and remove some of the mystery surrounding the bankruptcy and insolvency process.

There are currently no regulations prescribing the amount of fees that should be charged by a Trustee in relation to corporate insolvencies and bankruptcies or individual bankruptcies and insolvencies. Historically, the legislature in Barbados has been hesitant to regulate the fees charged by professionals for the work that they conduct. Attorneys-at-Law in Barbados are generally free to charge whatever sums they deem appropriate for the work that they undertake in relation to a legal matter. The fees charged, however, must be reasonable and may be reviewed by a Taxing Officer. The Supreme Court (Non-Contentious Probate Rules) sets a minimum scale of fees to be charged by Attorneys-at-Law in relation to various non-contentious matters, including the drafting of Wills, Conveyances and Lease Agreements.\(^{138}\) The minimum fees chargeable in these Rules is based on the consideration involved in the transaction. I suggest that a similar scale of fees be introduced in the Rules regarding the fees charged by Trustees in bankruptcy and insolvency matters. As illustrated in the corporate insolvency matters of *Airone* and *Grant Hotels Inc.* mentioned above, Trustees charge rather exorbitant fees in relation to the works that they undertake. Further, and perhaps more worrisome, the fees charged do not appear to be uniform in any way. In both the *Airone* and the *Grant Hotels Inc.* cases the debts owed by the debtors were in the region of $40,000,000. However, in the *Grant Hotels Inc.* case the Trustee made provisions for the payment of Trustee’s fees in the amount of $1,777,335 whereas in the *Airone* matter the Trustee stated that his fees would not ordinarily exceed $600,000. Implementing a scale of fees in the Rules would provide Debtors with the ability to calculate what sums they can reasonably expect to be charged by a Trustee based on the total level of their indebtedness. This would remove the uncertainty which surrounds the fees charged by Trustees and would also encourage Trustees to observe the guidelines set in the scale of fees and to charge fees reasonably commensurate with the work undertaken. Additionally, if Trustees were to charge fees in accordance with the scale of fees then the bankruptcy and insolvency process envisioned by the legislature may become more affordable and accessible to the public, thereby

\(^{138}\) The Supreme Court of Judicature Act, Cap. 117A of the Laws of Barbados
encouraging more companies and individuals to rely on the mechanisms provided in the Barbados BIA.

Additionally, in order to avoid the debate that has arisen in Canada with respect to the effectiveness of the mandatory counselling for individual bankrupts, I would suggest that the Rules address this issue directly. In order to be effective the counselling must be substantive. More than two sessions will likely be required to address and educate the debtor as to the causes of his financial woes. I would, therefore, suggest that the counselling take the form of a course to be conducted over a period of months. The purpose would continue to be to educate the debtor about responsible credit management but in order to obtain a discharge from bankruptcy the debtor would be required to receive a passing grade in the course. I believe that this would greatly reduce the risk of the debtor becoming bankrupt again. Further, it is in the interest of the society as a whole that acts and instances of bankruptcy are limited and as such I would encourage the legislature to make provisions for the government of Barbados to sponsor the counselling program, as well as a general education program about the benefits of the Barbados BIA.

The Public

The public at large remains hesitant to engage the provisions of the Barbados BIA. Only 4 proposals and 1 assignment into bankruptcy have been initiated under the Barbados BIA. In the 12 year history of the Barbados BIA no bankrupt individuals have relied on the provisions of the Barbados BIA. However, I believe that if the reforms mentioned above were implemented that the public would have more confidence in the administration of bankruptcies and insolvencies in Barbados and would rely more heavily on the provisions of the Barbados BIA. Apart from instituting the reformatory measures outlined above, however, the public will need to be educated about the provisions of the Barbados BIA and the ways in which the Act can assist those who are struggling financially. Creditors currently rely on the system of bringing a civil claim against a debtor to recover the debts that they are owed. In most circumstances this procedure follows a predictable and painful pattern. A claim is initiated for the recovery of the sums stated in the claim form. The debtor fails to defend the action in most cases and a default judgment is entered. Thereafter, the creditor seeks to enforce the judgment by way of a judgment
summons and the debtor is required to appear in court and make arrangements as to the repayment of the debts owed. This entire process can last several years from the date of filing to the date of judgment and the courts generally give the debtor several opportunities to repay the creditor even where he defaults on his arrangements to pay. However, the court retains the power to garnish an individual’s wages, or order the sale of an individual’s or company’s assets in order to satisfy the debts owed. Additionally, in extreme cases of failure to pay the debts owed to a creditor the court can make an order for the committal of a debtor thereby ordering that individual to serve a term of imprisonment. Despite the nature of this long, inefficient and drawn-out process creditors still insist on using these measures to recover debts. Similarly, despite the negative implications and the harsh penalties of this process debtors appear content to have such claims proceed through court rather than make an assignment or proposal under the Act that would provide them with greater protection.

An island-wide campaign targeted at businesspeople as well as private citizens must, therefore, be undertaken to advise the population about the benefits provided in by Barbados BIA. I believe that creditors continue to rely on the inefficient system of bringing a civil claim against a debtor who clearly cannot satisfy his debts because they are unaware of the benefits of the Barbados BIA. Similarly, debtors may be reluctant to rely on the Barbados BIA because they are ignorant as to the protections that it offers debtors. Educating the public fully on bankruptcy and insolvency issues would likely further remove the stigma of bankruptcy and encourage the public to rely on the provisions of the Act.

The Judiciary

The simple solution to fixing the problems encountered by an inefficient judicial system, which is clearly overburdened with numerous claims, is to appoint more judges. However, it is difficult to fathom, given the delays experienced in practice and the scathing criticisms of the CCJ that this solution has not been contemplated before. Appointing more judges to the bench would surely reduce the backlog of matters before the court and lead to the more efficient hearing of all claims including bankruptcy and insolvency matters. I can only speculate that this course of action has not been pursued due to a lack of interest on the part of legal practitioners to take up positions on the bench or a lack of funding available to make such appointments. However, the
delays experienced in completing bankruptcy and insolvency matters does not solely relate to the lack of judicial personnel available to hear the matters. The delays experienced are due, at least in part, to the lack of experience or training on the part of the judiciary in managing bankruptcy and insolvency matters. As a result of this lack of understanding, bankruptcy matters are often prolonged by procedural or substantive questions of law that judges have difficulty in answering. The Captain Haddock matter for example was delayed on hearing so that the judge could assess whether the Trustee needed to secure a bond for the performance of his duties. Additionally, the Grant Hotels Inc. insolvency and its associated claims have been delayed by questions concerning whether the Trustee breached his duties, which the court has been unable to resolve in a timely manner.

Therefore, I believe that the judiciary would benefit from seminars educating judges on the provisions of the Barbados BIA and the workings of the bankruptcy and insolvency system as a whole. Seminars of this nature would assist judges in adequately identifying and addressing the issues that may arise in hearing bankruptcy and insolvency matters. Conducting such seminars would familiarise judges with bankruptcy and insolvency issues and while this may not speed up the administration of justice as a whole in Barbados it would likely increase judges’ efficiency in disposing of bankruptcy and insolvency matters.

In conclusion, the bankruptcy and insolvency practice in Barbados is not working efficiently. The Barbados legislature blindly copied the Canada BIA without considering the larger legislative framework within which that Act stands. Additionally, the legislature of Barbados failed to consider the impact that the limited resources of the country would have on the administration of bankruptcy and insolvency matters in Barbados. Ultimately, the legislature also failed to recognize that Barbados did not have a bankruptcy culture and did nothing to inform the public of the benefits of the legislation or educate them about modern bankruptcy and insolvency practice. Therefore, a cumulative lack of Rules, trained Trustees and judges, prohibitively expensive Trustees fees and a lack of understanding on the part of the public about the role and functions of the legislation hinder the effectiveness of the Barbados BIA. These problems, however, can all be remedied. The Barbados BIA itself does not need to be amended but supporting rules must be enacted to ensure the efficient working of the bankruptcy and insolvency system in Barbados. Trustee and judges must be educated on how to handle matters arising under the Barbados BIA and the public must be provided with better access to Trustees
and information pertaining to bankruptcy and insolvency matters. The Supervisor of Insolvency in Barbados has suggested that Rules regarding the Barbados BIA are in the process of being drafted and will soon be enacted. A draft of these Rules has not been made available either to the general members of the Barbados Bar Association or the public for comment. However, it is hoped that the Draft Rules contain at least some of the reforms discussed herein as I believe that these will greatly increase the effectiveness of the Barbados BIA.
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Cases


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13. Companies’ Creditors Arrangement Act, SC 1932-33, c 36.
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Websites

1. Canadian Association of Insolvency and Restructuring Partners, Becoming a Member, online: CAIRP <http://www.cairp.ca/membership/becoming-a-member/general/index.php>.


Other Resources

Draft Legislation/Legislative Guides


Proposals


Statistics


2. Ms. Veronica Greenidge, Legal Assistant, of the Supreme Court Registry of Barbados, Filing Statistics for the year 2012.
Appendix A

1. Form 93, Application For Trustee License (Individual)